DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-207
Title: Maryland, Petitioner
v.
Alonzo Jay King, Jr.
Docketed: August 16, 2012
Linked with 12A48
Lower Ct: Court of Appeals of Maryland
Case Nos.: (68, September Term, 2011)
Decision Date: April 24, 2012
Rehearing Denied: May 18, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jul 13 2012	Application (12A48) for a stay of the judgment and mandate pending the filing and disposition of a petition for a writ of certiorari, submitted to The Chief Justice.
Jul 18 2012	UPON CONSIDERATION of the application of counsel for the applicant, IT IS ORDERED that the judgment and mandate of the Court of Appeals of Maryland, case No. 68, is hereby stayed pending receipt of a response, due on or before Wednesday, July 25, 2012, by 4 p.m., and further order of the undersigned or of the Court.
Jul 20 2012	Response to application from respondent Alonzo Jay King, Jr. filed.
Jul 23 2012	Reply of applicant Maryland filed.
Jul 26 2012	Letter submitted by respondent
Jul 30 2012	Application (12A48) granted by The Chief Justice. (In Chambers Opinion)
Aug 14 2012	Petition for a writ of certiorari filed. (Response due September 17, 2012)
Sep 4 2012	Brief amici curiae of Maryland Chiefs of Police Association, Inc., et al. filed.
Sep 11 2012	Order extending time to file response to petition to and including October 17, 2012.
Sep 12 2012	Brief amicus curiae of Steve Cooley, District Attorney for the County of Los Angeles filed.
Sep 17 2012	Brief amicus curiae of DNA Saves filed.
Sep 17 2012	Brief amici curiae of Maryland Legislators filed.
Sep 17 2012	Brief amicus curiae of National District Attorneys Association filed.
Oct 12 2012	Brief of respondent Alonzo Jay King, Jr. in opposition filed.
Oct 24 2012	DISTRIBUTED for Conference of November 9, 2012.
Oct 24 2012	Reply of petitioner Maryland filed. (Distributed)
Nov 9 2012	Petition GRANTED.
Nov 21 2012	Record Received from the Maryland Court of Appeals. 2 volumes.
Nov 27 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party.

	received from counsel for the respondent.
Dec 4 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Dec 18 2012	SET FOR ARGUMENT ON Tuesday, February 26, 2013
Dec 26 2012	Joint appendix filed. (Statement of costs filed)
Dec 26 2012	Brief of petitioner Maryland filed.
Dec 28 2012	Brief amici curiae of Genetics, Genomics and Forensic Science Researchers in support of neither party filed.
Dec 28 2012	Brief amicus curiae of National District Attorneys Association filed.
Jan 2 2013	Brief amicus curiae of the United States filed.
Jan 2 2013	Brief amicus curiae of National Governors Association, et al. filed.
Jan 2 2013	Brief amicus curiae of Los Angeles County District Attorney on behalf of Los Angeles County filed.
Jan 2 2013	Brief amicus curiae of Global Alliance for Rapid DNA Testing filed.
Jan 2 2013	Brief amici curiae of DNA Saves, et al. filed.
Jan 2 2013	Brief amici curiae of Maryland Crime Victims' Resource Center, Inc., et al. filed.
Jan 2 2013	Brief amicus curiae of Susana Martinez, Governor of the State of New Mexico filed.
Jan 2 2013	Brief amici curiae of California, et al. filed.
Jan 2 2013	Brief amicus curiae of Maryland Coalition Against Sexual Assault filed.
Jan 2 2013	Brief amici curiae of Maryland Chiefs of Police Association, Inc., et al. filed. (Distributed)
Jan 9 2013	Additional record received from the Court of Appeals of Maryland. Part of this record is electronic.
Jan 10 2013	CIRCULATED.
Jan 25 2013	Brief of respondent Alonzo Jay King, Jr. filed. (Distributed)
Jan 29 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Feb 1 2013	brief amicus curiae of Veterans for Common Sense filed. (Distributed)
Feb 1 2013	Brief amicus curiae of Howard University School of Law Civil Rights Clinic filed. (Distributed)
Feb 1 2013	Brief amicus curiae of Electronic Privacy Information Center and twenty-six technical experts and legal scholars filed. (Distributed)
Feb 1 2013	Brief amicus curiae of Public Defenders Service for the District of Columbia filed. (Distributed)
Feb 1 2013	Brief amicus curiae of National Association of Federal Defenders filed. (Distributed)
Feb 1 2013	Brief amici curiae of Genetic Scientists Robert Nussbaum and Sara H. Katsanis filed. (Distributed)
Feb 1 2013	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Feb 1 2013	Brief amicus curiae of Council for Responsible Genetics filed. (Distributed)
Feb 1 2013	Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)
Feb 1 2013	Brief amicus curiae of Electronic Frontier Foundation filed. (Distributed)
Feb 1 2013	Brief amici curiae of 14 Scholars of Forensic Evidence filed. (Distributed)
Feb 15 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Feb 19 2013 Reply of petitioner Maryland filed. (Distributed)

Feb 26 2013 Argued. For petitioner: Katherine Winfree, Chief Deputy Attorney General, Baltimore, Md.; and Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Kannon K. Shanmugam, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

RECORD
AND
BRIEFS

12 20[illegible]

No. ____

IN THE
Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

ALONZO JAY KING, JR.,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

Douglas F. Gansler
Attorney General of Maryland
Katherine Winfree
Chief Deputy Attorney General
*Brian S. Kleinbord
Robert Taylor, Jr.
Assistant Attorneys General
Office of the Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6435
bkleinbord@oag.state.md.us
Counsel for Petitioner

**Counsel of Record*

Library of Congress
Law Library

QUESTION PRESENTED

Does the Fourth Amendment allow the States to collect and analyze DNA from people arrested and charged with serious crimes?

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties below.

Page

TABLE OF CONTENTS

QUESTION PRESENTED. i

PARTIES TO THE PROCEEDING. ii

OPINIONS BELOW. 1

STATEMENT OF JURISDICTION. 1

CONSTITUTIONAL PROVISIONS INVOLVED. 1

STATEMENT OF THE CASE. 2

REASONS FOR GRANTING THE WRIT. 6

I. There Is A Split Among The Lower Courts Regarding The Constitutionality Of DNA Collection From Arrestees... 8

II. The Split In Lower Courts Disrupts Law Enforcement Efforts Nationwide.. 11

III. The Court Of Appeals' Ruling Misapplied This Court's Fourth Amendment Jurisprudence.. 13

A. The court incorrectly identified and weighed the privacy rights of arrestees... 14

1. The court mistakenly determined that an arrestee's privacy interest was in

Page

overall genetic privacy when, in fact, the State does not analyze any genetically meaningful information.. 14

2. An arrestee has no, or minimal, interest in concealing his identity.. . 17

3. The court gave undue weight to an arrestee's privacy interest by mistakenly applying the presumption of innocence, which is a trial right exclusively..... 19

B. The court improperly ignored or dismissed the State's interests.. 20

1. The State has an interest in precisely identifying people in its custody through the most reliable means.... 21

2. The State has an interest in solving unsolved crimes as expeditiously as possible.. 23

3. The court interfered with a legislative judgment in deciding that other existing means of identification, like traditional fingerprinting, were "sufficient."..... 23

C. The court's "two-search" theory prevents law enforcement from examining evidence already in its lawful possession

Page

— such as crime-scene evidence — without first obtaining a warrant based on probable cause..... 25

CONCLUSION..... 27

APPENDIX:

Reported opinion of the Court of Appeals of Maryland, *Alonzo Jay King, Jr., v. State of Maryland*, No. 68, Sept. Term, 2010 (filed April 24, 2012)..... 1a-85a

Order granting review, Court of Appeals of Maryland, *Alonzo Jay King, Jr., v. State of Maryland*, No. 2118, Sept. Term, 2010 (filed October 24, 2011)..... 86b

Order denying motion for reconsideration and stay of enforcement of mandate, Court of Appeals of Maryland, *Alonzo Jay King, Jr., v. State of Maryland*, No. 68, Sept. Term, 2011 (filed May 18, 2012)..... 87b

Order granting stay of judgment and mandate of Court of Appeals of Maryland, Supreme Court of the United States, *Maryland v. Alonzo J. King, Jr.*, No. 12A48 (filed July 18, 2012)..... 88b

Opinion granting stay of judgment and mandate of Court of Appeals of Maryland pending disposition of petition for writ of

Page

certiorari, Supreme Court of the United States,
Maryland v. Alonzo Jay King, Jr.,
No. 12A48 (filed July 30, 2012). 89b-92b

Page

TABLE OF AUTHORITIES

Cases:

Anderson v. Commonwealth, 274 Va. 469, *cert. denied*, 553 U.S. 1054 (2008) 9

Bell v. Wolfish, 441 U.S. 520 (1979) 20

Cupp v. Murphy, 412 U.S. 291 (1973) 18

District Attorney's Office v. Osborne, 557 U.S. 52 (2009) 8

Florence v. Bd. of Chosen Freeholders, 132 S.Ct. 1510 (2012) 20

Haskell v. Harris, 669 F.3d 1049 (9th Cir. 2012), *en banc review granted*, ___ F.3d ___, 2012 U.S. App. LEXIS 15378 (order dated July 25, 2012) 6, 9

Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177 (2004) 18

In re Welfare of C.T.L., 722 N.W.2d 484 (Minn. Ct. App. 2006) 9

Jones v. Murray, 962 F.2d 302 (4th Cir. 1992) . . . 19

Mario W. v. Kaipio, 2012 Ariz. LEXIS 153 (Ariz. 2012) . . . . . 9, *passim*

Page

NASA v. Nelson, 131 S.Ct. 746 (2011) 15

People v. Buza, 197 Cal. App. 4th 1424 (Cal. Ct. App. 2011), *cert. granted*, 132 Cal. Rptr. 3d 616 (Cal. 2011) 10

Rakas v. Illinois, 439 U.S. 128 (1978) 19

Samson v. California, 547 U.S. 843 (2006) ..... 3, *passim*

State v. Raines, 383 Md. 1, 857 A.2d 19 (2004) 4, 18

United States v. Dillard, 214 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 907 (2001) 20

United States v. Dionisio, 410 U.S. 1 (1973) 18

United States v. Fricosu, 2012 U.S. Dist. LEXIS 22654 (D. Colo. 2012) 9

United States v. Kelly, 55 F.2d 67 (2d Cir. 1932) 15, 18

United States v. Knights, 534 U.S. 112 (2001) ..... 3, *passim*

United States v. Mitchell, 652 F.3d 387 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1741 (2012) ..... 9, *passim*

United States v. Pool, 621 F.3d 1213

Page

(9th Cir. 2010). 9

United States v. Purdy, 2005 U.S. Dist. LEXIS 40433 (D. Neb. 2005). 10

United States v. Robinson, 414 U.S. 218 (1973) 13

Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008) 17

Weeks v. United States, 232 U.S. 383 (1914) 13

Whalen v. Roe, 429 U.S. 589 (1977) 17, 24

Constitutional Provisions:

United States Constitution:
Amendment IV. . . . . 1, *passim*
Amendment V. . . . . 14, *passim*
Amendment XIV. 2

Statutes:

United States Code:

28 U.S.C. § 1257 1
42 U.S.C. § 14132 11

Annotated Code of Maryland:

Public Safety Article:
§ 2-504. . . . . 2, 9

Page

§ 2-505.. 14
§ 2-508.. 14
§ 2-512.. 15

Md. Code Regs. 29.05.01.06 (2012).. 16

Miscellaneous:

2008 Md. Laws Ch. 337 8

David H. Kaye, *A Fourth Amendment Theory for Arrestee DNA and Other Biometric Databases*, University of Pennsylvania Journal of Constitutional Law Vol. 15 (forthcoming).. 13

David H. Kaye, *Who Needs Special Needs? On the Constitutionality of Collecting DNA and Other Biometric Data from Arrestees*, 34 J.L. Med. & Ethics 188 (2006). 19

National Research Council, *Strengthening Forensic Science in the United States*, National Academies Press (2009). 24

Sara H. Katsanis and Jennifer K. Wagner, *Characterization of the Standard and Recommended CODIS Markers,* Journal of Forensic Science. 16

DNAResource.com, "2011 DNA Database Legislation". 10

Petitioner, the State of Maryland, respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland.

OPINIONS BELOW

The reported opinion of the Court of Appeals of Maryland reversing the judgment of the Circuit Court for Wicomico County, Maryland, is reproduced in Appendix A. (App. 1a-85a). The order granting certiorari review before judgment in the Court of Special Appeals of Maryland on direct appeal is reproduced in Appendix B. (App. 86b). The order of the Court of Appeals of Maryland denying the State's Motion for Reconsideration is reproduced in Appendix B. (App. 87b).

STATEMENT OF JURISDICTION

The decision of the Court of Appeals of Maryland was filed on April 24, 2012. The order of the Court of Appeals denying the State's motion for reconsideration was filed on May 18, 2012. Therefore, the jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On September 23, 2003, Vonette W. was raped and robbed in her home by a masked intruder wielding a handgun. A forensic examination of the victim uncovered semen from the rapist. Analysis of that material yielded an identifying DNA profile of the rapist, but that profile did not match any known DNA profile in state or federal databases.

Alonzo Jay King was arrested in April of 2009, in Wicomico County, Maryland, and charged with first- and second-degree assault stemming from an unrelated incident. First-degree assault is a qualifying crime of violence under Maryland's DNA Collection Act, Md. Code Ann., Pub. Safety §2-504 (LexisNexis 2011 Repl. Vol.), and, therefore, King was required to submit to a buccal swab of his cheek for use in DNA testing within the guidelines of the Act. The DNA test of the buccal swab yielded an identifying DNA profile, and that profile was submitted to the Combined DNA Index System (CODIS) for comparison to any unknown DNA samples on file. This comparison yielded a match

between King's DNA and the previously unknown DNA recovered from the rape of Vonette W. That match formed the basis of a warrant for a second buccal swab of King, which was tested with the same results. Based on the DNA match, King was charged with the 2003 rape and robbery.

King moved to suppress the DNA evidence prior to his trial, arguing, among other things, that Maryland's DNA Collection Act violated the Fourth Amendment. His suppression motion was denied. King then agreed to waive his right to a jury trial and to be tried on an agreed statement of facts. On July 27, 2010, he was convicted of first-degree rape. He appealed his conviction to the Court of Special Appeals of Maryland, again raising a Fourth Amendment challenge to the DNA Collection Act. The appeal was removed to the Court of Appeals of Maryland on the court's own motion. (App. 86b).

In its decision below, the Court of Appeals acknowledged that it had "previously [ ] upheld the constitutionality of the Act, as applied to convicted felons," but observed that it was now being called upon to consider an extension of the statute that concerned "rights given to, and withdrawn from, citizens who have been arrested." (App. 3a).

Relying on *United States v. Knights*, 534 U.S. 112 (2001), and *Samson v. California*, 547 U.S. 843 (2006), for a "totality of the circumstances balancing test," (App. 3a), the Court of Appeals concluded that King had a "sufficiently weighty and reasonable expectation of privacy against warrantless, suspicionless searches that [was] not outweighed by the State's purported interest in assuring proper identification of him as to

the crimes for which he was charged at the time." (*Id.*) The court found that because the State had already "identified King accurately and confidently through photographs and fingerprints," it had "no legitimate need for a DNA sample in order to be confident who it arrested or to convict him on the first- or second-degree assault charges." (*Id.*)

In the court's estimation, "at the heart of this debate" is the "presumption of innocence cloaking arrestees and whether legitimate government interests outweigh the rights of a person who has not been adjudicated guilty of the charged crime." (App. 29a). With this apparent assumption in mind, the court suggested that an arrestee is "somewhere closer along the continuum to a person who is not charged with a crime than he or she is to someone convicted of a crime." (App. 29a). The court then found that the State had to shoulder "the burden of overcoming the arrestee's presumption of innocence and his expectation to be free from biological searches before he is convicted of a qualifying crime." (App. 58a).

The court also employed the presumption of innocence as a means of distinguishing its earlier decision in *State v. Raines*, 383 Md. 1, 857 A.2d 19 (2004), in which the court had upheld the DNA Collection Act as applied to convicted felons. According to the court, the presumption of innocence tilted the scale in King's favor in this case: "If application of the balancing test resulted in a close call when considering convicted felons," the court observed, "then the balance must surely tip in favor of our closely-held belief in the presumption of innocence here." (App. 59a).

The court "d[id] not embrace wholly the analogy

between fingerprints and DNA samples." (App. 60a). The court accepted that a buccal swab constituted a "minimal" physical intrusion, but nevertheless found that intrusion "distinct," for Fourth Amendment purposes, from a fingerprint. (*Id.*). The court did so because, although the statute has built-in safeguards against misuse of information, the court "could not turn a blind eye to the vast genetic treasure map that remains in the DNA sample retained by the State." (App. 61a).

Judge Mary Ellen Barbera, joined by Judge Alan E. Wilner, dissented on the ground that the majority "overinflat[ed] an arrestee's interest in privacy and underestimat[ed] the State's interest in collecting arrestee DNA." (App. 73a).

With respect to an arrestee's privacy interest, the dissenting opinion noted that individuals lawfully arrested have a greatly diminished expectation of privacy and that the law already permits significant intrusions on an arrestee's privacy, including a full head-to-toe search incident to arrest, and a strip search and body cavity inspection upon entering the local jail. (App. 76a). The dissent emphasized that the buccal swab was a *de minimis* intrusion, and far less invasive than a blood draw. (App. 77a). Further, the dissent identified the privacy interest at stake, not as wholesale genetic information, but rather as limited to "identification information revealed by the 13 loci." (App. 82a). That privacy interest, the dissent said, was quite limited, if it existed at all.

The dissent also criticized the majority's grudging assessment of the State's strong law-enforcement interests at stake. Judge Barbera rejected the

majority's claim that the government should rely on traditional and less intrusive methods of identification, and thus has no need for DNA collection. She noted that the State had a strong interest in using the most reliable form of identification, and deemed the majority's position "'a Luddite approach' to Fourth Amendment interpretation." (App. 84a, quoting *Haskell v. Harris*, 669 F.3d 1049 (9th Cir. 2012), *en banc review granted*, ___ F.3d ___, 2012 U.S. App. LEXIS 15378 (order dated July 25, 2012)). With respect to the majority's rejection of the fingerprint analogy, Judge Barbera stated she "could not disagree more." (App. 79a). She noted that the law restricts testing to identification only, and added that the statute "categorically prohibits the plundering of 'the vast genetic treasure map' that is incidentally made available by DNA collection." (*Id.*).

The State asked the Court of Appeals to stay its mandate and reconsider the decision; that motion was denied on May 18, 2012. (App. 87b). The State then sought a stay from this Court, which was granted by the Chief Justice in his capacity as Circuit Justice for the Fourth Circuit. (App. 89b-92b). This petition follows.

REASONS FOR GRANTING THE WRIT

This is a case about whether the Fourth Amendment allows public safety officials to collect identifying DNA information from people who have been lawfully arrested and charged with serious crimes. This is not a case in which the State wrongfully disseminated, or otherwise made use of, a suspect's wholesale genetic information. Indeed, the State did not even cast its high-tech eyes on any true

gene, medically sensitive or otherwise.

Nonetheless, the Court of Appeals of Maryland operated from the premise that the State was looting a "vast genetic treasure" when it obtained a DNA profile from a person in its custody, and based upon that false conception of the issue at stake, struck down Maryland's DNA Collection Act as applied to arrestees. In so doing, the court exacerbated an existing split in the lower courts on this topic.

The Court of Appeals purported to apply a "totality of the circumstances" analysis, but it considered the wrong interests through the wrong lens in weighing King's privacy interest, while dismissing or ignoring the State's interests in reliably identifying people in its custody and solving crimes. Moreover, the court needlessly interjected a flawed "two-search" theory of the Fourth Amendment that, while seemingly not instrumental to its holding, portends dire consequences for all forms of forensic testing. These errors are not unique to the Court of Appeals of Maryland; they typify the factual, legal, and analytical mistakes made by the other courts that have blocked the collection of DNA on Fourth Amendment grounds.

This case presents an important issue because the split in the lower courts adversely affects public-safety efforts nationwide. As the Chief Justice recognized in granting the State's request for a stay, "the decision below has direct effects beyond Maryland: Because the DNA samples Maryland collects may otherwise be eligible for the FBI's national DNA database, the decision renders the database less effective for other States and the Federal Government." (App. 91b). This case truly presents a question vital to the nation as a

whole, and this Court should therefore grant the certiorari writ to review the judgment below.

I. There Is A Split Among The Lower Courts Regarding The Constitutionality Of DNA Collection From Arrestees.

This Court has recognized the tremendous value of DNA evidence in the criminal justice system, and at the same time has recognized the effectiveness, and desirability, of state legislation in establishing rules for its use:

> DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices. The Federal Government and the States have recognized this, and have developed special approaches to ensure that this evidentiary tool can be effectively incorporated into established criminal procedure – usually but not always through legislation.

DA's Office v. Osborne, 557 U.S. 52, 55-56 (2009) (rejecting an "approach [that] would take the development of rules and procedures in this area out of the hands of legislatures and state courts").

Consistent with the Court's observation, 27 States and the Federal Government have DNA collection statutes that mandate the collection of DNA profiles from people arrested for, but not yet convicted of, various qualifying offenses. The Maryland statute at issue in this case was amended in 2008 to include arrestees, 2008 Md. Laws Ch. 337, and mandates

collection from people charged with burglary, crimes of violence, or attempts to commit burglary or crimes of violence. Md. Code Ann., Pub. Safety Art. §2-504(a)(3) (LexisNexis 2011 Repl. Vol.).

Unlike the court challenges to DNA collection from convicted persons, which have been unanimously rejected, court challenges to DNA collection from arrestees have resulted in a patchwork quilt of decisions, reaching different conclusions based on different grounds. The decision of the Court of Appeals conflicts with that of the Third Circuit Court of Appeals, *United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1741 (2012); the Ninth Circuit Court of Appeals, *Haskell v. Harris*, 669 F.3d 1049 (9th Cir. 2012), *en banc review granted*, ___ F.3d ___, 2012 U.S. App. LEXIS 15378 (order dated July 25, 2012)[1]; and the Supreme Court of Virginia. *Anderson v. Commonwealth*, 274 Va. 469, 650 S.E.2d 702 (Va. 2007), *cert. denied*, 553 U.S. 1054 (2008).

The Arizona Supreme Court has struck down that State's arrestee collection law, at least as applied to juveniles, on Fourth Amendment grounds. *Mario W. v. Kaipo*, 2012 Ariz. LEXIS 153 (Ariz. 2012). Arrestee collection has also been struck down in Minnesota. *In re Welfare of C.T.L.*, 722 N.W.2d 484 (Minn. Ct. App.

---

[1] The Ninth Circuit has upheld the federal version of the DNA collection statute in *United States v. Pool*, 621 F.3d 1213 (9th Cir. 2010). As with *Haskell*, that opinion was withdrawn for *en banc* review, but was later dismissed as moot before the en banc hearing was held. 659 F.3d 761 (9th Cir. 2011). The federal statute was also upheld by *United States v. Fricosu*, 2012 U.S. Dist. LEXIS 22654 (D. Colo. 2012).

2006).[2]

While consistently couched in terms of Fourth Amendment jurisprudence, the reasoning of the courts striking down or upholding the law has varied. In *Mitchell* and *Mario W.*, as well as in this case, the courts applied a "two-search" analysis, treating the collection of the sample and the analysis of the sample as two distinct Fourth Amendment events. In *Mitchell*, the court concluded that both "searches" were permissible. In this case, the court determined that neither search was permissible. In *Mario W.*, the court determined that the collection was allowed, but the analysis was not.

This disarray in the lower courts requires clarification by this Court. States that are contemplating expanding their DNA collection statutes to include arrestees must know if the Fourth Amendment allows it.[3] And States that use DNA from arrestees in prosecutions must know whether that

---

[2] An intermediate appellate court in California has also found that DNA collection from arrestees violates the Fourth Amendment; this decision has been depublished pending review by the California Supreme Court. *People v. Buza*, 197 Cal. App. 4th 1424, 129 Cal. Rptr. 3d 753 (Cal. Ct. App. 2011), *cert. granted*, 132 Cal. Rptr. 3d 616, 262 P.3d 854 (Cal. 2011). The United States District Court for Nebraska also found that state's arrestee collection law violated the Fourth Amendment. *United States v. Purdy*, 2005 U.S. Dist. LEXIS 40433 (D.Neb. 2005).

[3] In 2011, state legislatures in 11 states considered bills proposing the addition of arrestee provisions to their existing DNA collection statutes. *See* DNAResource.com, "2011 DNA Database Legislation," http://www.cqstatetrack.com/texis/viewrpt/main.html?event=495bdbf6ba (last visited August 9, 2012).

DNA was lawfully acquired – and, indeed, whether there is any meaningful distinction, from a Fourth Amendment perspective, between a DNA "hit" obtained from a post-conviction sample and a DNA "hit" obtained from a post-arrest sample. This Court should grant certiorari review to resolve the split and to set forth the correct analytical framework for considering any future challenges to the collection and analysis of DNA.

II. The Split In Lower Courts Disrupts Law Enforcement Efforts Nationwide.

The usefulness of DNA profiles as a public safety tool is greatly enhanced by the existence of a nationwide database of DNA profiles created by Congress in 1994 with the passage of the DNA Identification Act, 42 U.S.C. §14132. The database, known as the Combined DNA Index System, or CODIS, allows for the comparison of profiles across the nation and helps identify suspects otherwise known only by the biological profiles they have left behind. As a result of the disparate approaches and holdings of the lower courts regarding the collection of DNA samples from arrestees, the seamless, multi-state DNA database system that was intended to be a powerful and accurate tool for identifying suspects and exonerating the innocent has been impaired.

The Court of Appeals ruled that taking DNA profiles from lawfully arrested people violates the Fourth Amendment to the United States Constitution. This decision significantly impedes the State's ability to identify and prosecute criminals. Moreover, the differing results reached by various lower courts considering this issue have interfered with the

operation of national, multi-state forensic DNA databases. Because the use of DNA from arrestees affects law enforcement operations across state lines, the schism between those States that allow arrestee DNA samples and those that do not creates confusion in prosecutions far outside the jurisdiction of those courts which have struck down DNA collection laws on Fourth Amendment grounds. Profiles previously submitted to CODIS in some states may no longer be used for comparison purposes in other states. Detailed and highly structured legislative schemes for improving the efficiency and efficacy of law enforcement and pretrial detention are dismantled. Moreover, when a state court refuses to allow the collection or submission of lawfully acquired DNA samples, all states suffer, because the database is smaller than it otherwise would be.

It is for these reasons that this Court should grant review in this case. Twenty-seven states and the federal government have adopted statutes which allow for the collection of identifying DNA profiles from arrestees, and more are likely to follow. State and federal courts have reached different, and irreconcilable, conclusions regarding the propriety of these statutes under the Fourth Amendment. This haphazard, state-by-state interpretation of the Fourth Amendment requires guidance from this Court.[4]

---

[4] The fact that the Maryland statute in question will, if no further action is taken by the state legislature, expire as of January 1, 2014, provides no basis for denying review. Given the strong expressions of support from state elected officials in the wake of the Court of Appeals' decision, there is no reason to

(continued...)

III. The Court Of Appeals' Ruling Misapplied This Court's Fourth Amendment Jurisprudence.

In determining whether Maryland's DNA Collection Act complied with the Fourth Amendment, the Court of Appeals applied the "totality of the circumstances" balancing test used by this Court in *United States v. Knights*, 534 U.S. 112 (2001) and *Samson v. California*, 547 U.S. 843 (2006).[5] The court's

---

[4](...continued)
believe that the law would be allowed to "sunset;" earlier sunset provisions written into the law were removed before the law could expire. Morever, even in the unlikely event that the law were allowed to expire, that would not render this case moot, and lawmakers in Maryland and all other states would still require some guidance as to what form of legislation might take its place. Lastly, the Fourth Amendment issues raised by this case are critical not just in Maryland, but nationwide.

[5] The *Knights/Samson* approach is not necessarily the only approach applicable to an arrestee-collection case such as this. As discussed in *United States v. Robinson*, 414 U.S. 218 (1973), a search of a suspect's person incident to a lawful arrest are "not only an exception to the warrant requirement of the Fourth Amendment, but [] also a 'reasonable' search under that amendment." *Id.* at 235. *See also Weeks v. United States*, 232 U.S. 383, 392 (1914) (recognizing well-established right of police to "search the person of the accused when legally arrested[.]"). Considered as a search incident to King's arrest, the collection and analysis of identifying information from a buccal swab would also pass constitutional muster. And, indeed, there are still other theories of Fourth Amendment jurisprudence that could be applied. *See, e.g.*, David H. Kaye, *A Fourth Amendment Theory for Arrestee DNA and Other Biometric Databases*, University of Pennsylvania Journal of Constitutional Law, Vol. 15 (in press) (arguing for categorical "biometric identification" exception encompassing, among other things, fingerprint and DNA (continued...)

application of that test was, however, deeply flawed. Neither its determination of King's privacy interest nor its assessment of the State's interests survives scrutiny.

A. The court incorrectly identified and weighed the privacy rights of arrestees.

The court erred from the start by determining that King's privacy interest embraced his genetic information writ large. This, in turn, allowed the court to draw a false distinction between DNA sampling and traditional fingerprinting. Compounding that error, the court appears to have assumed, without critical analysis, that the Fifth Amendment trial right to a presumption of innocence applies to a pretrial Fourth Amendment analysis of a search. As a result, its conclusion that the collection of DNA heavily impinged on an arrestee's right of privacy was incorrect.

1. The court mistakenly determined that an arrestee's privacy interest was in overall genetic privacy when, in fact, the State does not analyze any genetically meaningful information.

At issue in this case is what information is actually analyzed by the State, not what information could, in theory, be obtained by anyone with access to King's cells. There are both regulatory and statutory barriers to the misuse of DNA information. Collection and storage of DNA information is limited to "DNA records that directly relate to the identification of individuals[,]" Md. Code Ann., Pub. Safety §2-505, and

---

[5](...continued)
identification).

access to DNA information is narrowly circumscribed. *Id.*, §2-508. Moreover, it is a crime – punishable by up to five years' incarceration and a $5,000 fine – to improperly disclose or obtain DNA information. *Id.*, §2-512. Such restrictions are sufficient to remove from consideration the speculative harm of misuse of personal data. *See, e.g., NASA v. Nelson*, 131 S. Ct. 746, 761-762 (2011) (laws and regulations limiting public disclosure of private data sufficient to protect against fears of improper dissemination). Other courts have – in assessing statutes with far fewer restrictions – refused to speculate as to the possible harms of potential *ultra vires* misuse of biometric information.[6]

Because the State's interest is only in identity, the State does not analyze true genes of the people it arrests.[7] It analyzes specific non-coding areas of

---

[6] "It should be added that all United States attorneys and marshals are instructed by the Attorney General not to make public photographs, Bertillon measurements or finger prints prior to trial, except when a prisoner becomes a fugitive from justice, and are required to destroy or to surrender to the defendant all such records after acquittal or when the prisoner is finally discharged without conviction. There is therefore as careful provision as may be made to prevent the misuse of the records and there is no charge of any threatened improper use in the present case." *United States v. Kelly*, 55 F.2d 67, 70 (2d Cir. 1932).

[7] In addition to the statutory and regulatory bars, there are practical reasons why the State has neither the ability nor the desire to gather and analyze genetic data from suspects. First, the state forensic laboratory simply does not possess the profiling kits necessary to capture information about other loci. Second, because the profiles in the databases show only a small group of pre-approved, non-coding loci, the State would be unable to compare

(continued...)

chromosomes that are used for identification purposes. These non-coding loci, by definition, do not correspond to any biological traits or phenotypical characteristics; they are not "genes" in the true sense of that word. *See* Sara H. Katsanis and Jennifer K. Wagner, *Characterization of the Standard and Recommended CODIS Markers*, Journal of Forensic Science (in press) (concluding that loci used for forensic identification do not convey any sensitive or biomedically relevant information). The forensic laboratory does not have the capacity to analyze any other DNA taken from the sample cells, CODIS does not accept any information outside its pre-approved profile fields, and both the law and the relevant regulations expressly forbid any other use of the DNA. *See* Md. Code Regs. 29.05.01.06 (2012) (restricting use of samples).

The end result of the collection and analysis of these loci is a string of numbers unique to that particular individual. This sequence of numbers is useful only as an identifier; it reveals nothing else about that person. While the State necessarily has to take entire cells from arrestees to access the non-coding loci it uses to identify individuals, the only information it actually obtains and uses from those cells is this string of numbers that reveals nothing

---

[7](...continued)
any improper information to profiles in the databases even if it possessed that information. Third, the State has absolutely no interest in learning if an unknown suspect has a genetic propensity for diabetes; it simply wants to identify him or her, and that goal is in no way advanced by gleaning genetic data that is useless from a forensic identification standpoint.

about individual genetic traits.[8]

This Court has made it clear that in judging whether a statute passes constitutional muster, the statute's presumptive correctness and a proper consideration of the role of the courts require that the court not "go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). Thus, in *Whalen v. Roe*, 429 U.S. 589, 601 (1977), this Court refused to find that a right to privacy was violated because of the potential that a state agent might violate the restrictions on use and disclosure of information gathered pursuant to statute.

Any fair Fourth Amendment analysis of DNA collection statutes must restrict itself to the actual statutes as written and enforced, and not in wild, baseless speculation about the potential for deliberate or negligent non-statutory uses of the information gathered. In assessing the nature of King's privacy interest, therefore, the lower court should have considered only his interest in his biological identity.[9]

2. An arrestee has no, or minimal, interest in concealing his identity.

---

[8] A standard DNA profile does indicate whether the donor has a Y-chromosome or not, thus revealing the donor's gender.

[9] The term "biological identity" is somewhat imprecise, but more accurate than "genetic identity" since the identifying sequence of numbers derived from a biological sample reveals nothing about a subject's genes.

The only information being obtained from King by the analysis of his buccal swab goes to his biological identity, and arrestees have no objectively reasonable expectation of privacy in their identities. It is well established that neither the Fourth nor the Fifth Amendment prohibits the State from asking the name and birth date of people it has arrested, or from taking their fingerprints and photographs.

This Court has made it plain that there is no Fourth Amendment right to anonymity. *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 186-87 (2004) (finding that law requiring individual subjected to *Terry* stop to identify himself did not violate Fourth Amendment); *United States v. Dionisio*, 410 U.S. 1 (1973) (upholding right of grand jury to require witnesses to provide voice exemplars). Nor is there a Fourth Amendment right to hide physical evidence of one's involvement in a crime after being arrested. *Cupp v. Murphy*, 412 U.S. 291, 295-96 (1973). It is for these reasons that no court has barred fingerprinting or photographing arrestees. *See, e.g., United States v. Kelly*, 55 F.2d 67 (2d Cir. 1932) (allowing routine fingerprinting of arrestees).

Indeed, the Court of Appeals previously agreed with the fingerprint analogy. In *Raines*, 383 Md. at 18 n.11, 857 A.2d at 29, n.11, the court – upholding the Maryland DNA Collection Act as applied to convicted people – noted that "[t]he Act merely serves to identify the perpetrator similar to the way investigators have used fingerprints for many years." The *Raines* court noted with favor a similar ruling in the Fourth Circuit Court of Appeals, upholding Virginia's DNA Collection Act against a Fourth Amendment challenge: "As with

fingerprinting, therefore, we find that the Fourth Amendment does not require an additional finding of individualized suspicion before blood can be taken from incarcerated felons for the purpose of identifying them." *Jones v. Murray*, 962 F.2d 302, 306-07 (4th Cir. 1992); *see also* David H. Kaye, *Who Needs Special Needs? On the Constitutionality of Collecting DNA and Other Biometric Data from Arrestees*, 34 J.L. Med. & Ethics 188, 193 (2006).

The Court of Appeals erred, therefore, when it found that King had a reasonable expectation of privacy in his biological identity simply because that identity was expressed in terms of a sequence of numbers as opposed to a fingerprint, photograph, birth date, or name. (App. 61a). The State was entitled to determine King's identity in any reasonable fashion. While he may have hoped that his identity would remain hidden, King had no reasonable expectation of withholding his identity from the State after his arrest – even though the State, having obtained it, might then learn that he was involved in other crimes. *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978) ("[A] 'legitimate' expectation of privacy by definition means more than a subjective expectation of not being discovered.").

3. The court gave undue weight to an arrestee's privacy interest by mistakenly applying the presumption of innocence, which is a trial right exclusively.

When weighing King's privacy interests, not only did the Court of Appeals identify the wrong privacy interest, it then improperly determined that the "presumption of innocence" magnified King's

expectation of privacy. (App. 58a) (State "bears the burden of overcoming the arrestee's presumption of innocence and his expectation to be free from biological searches").

But the Fifth Amendment trial right to a presumption of innocence has nothing to do with the Fourth Amendment pretrial right to be free from unreasonable searches and seizures. In *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court held that the presumption of innocence "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." *Id.* at 533; *see also United States v. Dillard*, 214 F.3d 88, 102 (2d Cir. 2000) (rejecting application of "presumption of innocence" to pretrial bail determinations), *cert. denied*, 532 U.S. 907 (2001). As this Court has recently noted, once lawfully in State custody, a criminal suspect simply does not retain the same privacy interest as a non-arrested person. *Florence v. Bd. of Chosen Freeholders*, 132 S.Ct. 1510 (2012) (allowing invasive searches of people arrested for even minor offenses). Thus, the presumption of innocence that protected King at his trial should have no effect on the determination of whether, as a person lawfully under arrest for a crime of violence, he had an objectively reasonable expectation to keep his DNA profile private. The State is not required to overcome the "presumption of innocence" before it may search an arrestee.

B. The court improperly ignored or dismissed the State's interests.

The Court of Appeals also erred in the second part

of its *Knights/Samson* analysis. The court incorrectly found that the State's interest in identifying people it had arrested was reduced simply because the arrestee had not yet been convicted. The court did not consider at all the State's interest in learning if the people it had arrested were involved in other crimes. And the court improperly substituted its judgment for that of the legislature in deciding that identifying arrestees by their photographs or fingerprints was sufficient to meet the State's needs.

1. The State has an interest in precisely identifying people in its custody through the most reliable means.

King, like many people charged with crimes of violence, remained in state custody pending trial. The State clearly has an interest in knowing the identities of the people in its custody. King could give a false name, he could even change his appearance, but the unique number sequence derived from his DNA remains constant. The lower court appeared to distinguish the State's interest in knowing who was in its custody or under its supervision post-trial from its interest in knowing who was in its custody or under its supervision pretrial, (App. 65a) ("There is no interest in prison safety or administration present."). That is simply false. King was an inmate in the Wicomico County Detention Center from the time he was arrested until he was sentenced to the Maryland Division of Correction after his rape conviction.

Similarly, the State has an interest in accurately determining whether King had a history of criminal behavior. By obtaining King's DNA profile, the State could (and did) check to see whether the person with

that DNA profile was associated with any other crimes – and in so doing, discovered that the person with that DNA profile was the primary suspect in a six-year-old rape case. This information about other criminal involvement provides the State with guidance on what bail (if any) should be set pending trial, what level of pretrial supervision should be ordered, whether King was wanted in other states, and even where King should be housed while incarcerated.[10]

The State's interest in learning the biological identity of arrestees is not reduced because the arrestees have not yet been convicted. While it is true that the State's interest in collecting DNA information from arrestees differs, in some respects, from its interest in collecting DNA information from convicted people, for the most part the interests are the same. The lower court decreed, without analysis, that "the expectation of privacy of an arrestee renders the government's purported interests in DNA collection reduced greatly. . . . King's expectation of privacy is greater than that of a convicted felon . . . and the State's interests are more attenuated reciprocally." (App. 59a). Not only is this statement incorrect, but it makes the illogical assertion that the State's interests are wholly dependent upon the arrestee's expectations, and vice-versa. Of course it is possible both for the arrestee to have a significant privacy interest AND for

---

[10] The fact that DNA evidence of an arrestee's involvement in another crime might not come to light until after the initial bail decision has been made does not eliminate it from consideration. A person awaiting trial might not have "made bail" before the DNA match is discovered; a person released on pre-trial supervision may be brought back into custody.

the State to have its own significant interests in conducting the search, just as it is possible for the arrestee to have no meaningful privacy interest and the State to have no meaningful interest in conducting the search. The two interests are not dependent upon one another; the strength of one does not increase at the expense of the other.

2. The State has an interest in solving unsolved crimes as expeditiously as possible.

Additionally, of course, the State has an interest in solving crimes. The minimally invasive search of a person already in police custody to obtain nothing more than identifying information constitutes a *de minimis* intrusion, but the value of the information obtained is significant – the State can, at the very least, narrow its field of suspects and save investigative resources, it can solve crimes faster, it can identify suspects with greater accuracy, and it can reduce the risk of setting a dangerous criminal free due to its failure to identify him as such.

3. The court interfered with a legislative judgment in deciding that other existing means of identification, like traditional fingerprinting, were "sufficient."

Lastly, the court erroneously discounted the State's interest in identifying arrestees through their DNA by improperly substituting its judgment for that of the legislature in determining which forms of arrestee identification were sufficient for public-safety purposes. (App. 66a-67a). Whether the State could, in theory, identify people in other ways is simply irrelevant. "State legislation which has some effect on

individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part." *Whalen*, *supra*, 429 U.S. at 597. The legislature of Maryland, like that of the United States and 26 other States, has determined that DNA profiles should be obtained as a part of the booking process for certain arrestees. That an arrestee may also be identified in other ways has nothing to do with the Fourth Amendment analysis.

Even if the existence of alternative means of identification were relevant to the analysis, the Court of Appeals was incorrect in its assumption that fingerprint or photographic identification is an equal substitute. In King's case, for example, the victim did not recognize her assailant and he left no usable fingerprints behind; his identifying "calling card" was the DNA he left at the scene of the crime. Moreover, the determination of identity through DNA is the most scientifically accurate method of identification available to the State. *See* National Research Council, *Strengthening Forensic Science In The United States*, National Academies Press at 139 (2009) (comparing the subjectivity of fingerprint comparison to the objective standards of DNA comparison). King's identity was known to the rape investigators only as a sequence of numbers. Obtaining his identity in a different format – as a series of friction ridges on a fingerprint card – after he was arrested did not meet the State's legitimate identification needs.

What the State did with King's identity once it was lawfully obtained was not a Fourth Amendment factor at all. Certainly part of the value of having King's identity in the form of a CODIS-compatible DNA

profile arose from the State's ability to then submit that profile for comparison in CODIS. But the comparison of King's profile to samples already stored in databases was not a Fourth Amendment "event," any more than comparing his identification in any other form implicated the Fourth Amendment. There are no Fourth Amendment issues in checking King's name and birth date for outstanding warrants, or in comparing his photograph to "wanted" posters, or in submitting his scanned and digitized fingerprints to the Integrated Automated Fingerprint Identification System (IAFIS) for comparison, and similarly, there are no Fourth Amendment barriers to submitting a DNA profile for comparison. Not only was the lower court incorrect in substituting its judgment for that of the legislature on this point, it was incorrect in deciding that fingerprints, photographs, and DNA profiles were mutually fungible.

C. The court's "two-search" theory prevents law enforcement from examining evidence already in its lawful possession — such as crime-scene evidence — without first obtaining a warrant based on probable cause.

Another error, and another basis for review, relates to the Court of Appeals' invocation of a "two-search" theory. The court stated that, "[a]s other courts have concluded, we look at any DNA collection effort as two discrete and separate searches. The first search is the actual swab of the inside of King's mouth and the second is the analysis of the DNA sample thus obtained, a step required to produce the DNA profile." (App. 58a). The court was correct in observing that "other courts" have done the same thing. It was

incorrect in following suit.

There is one search. The search begins with the swab of the cheek and ends with the production of the numbers that constitute King's DNA profile. Describing this as two searches creates massive, and unsolvable, conceptual and practical problems. By referring to the examination of the cells as a new search, courts necessarily create a need for police to make new showings of probable cause each time they seek to examine evidence already properly in their possession. Thus, police would have to obtain a warrant to derive a DNA profile from the swabs taken from a rape victim. They would have to make a showing of probable cause before test-firing a weapon taken from a person arrested on an outstanding warrant. The police would have to obtain a warrant to examine objects found on the street, or turned over to them by third parties.

This "two search" theory has been articulated by other courts. Applying it, one court has held that both searches are constitutional, one court has held that the collection but not the testing is constitutional, and the Court of Appeals held in the decision below that both searches are *un*constitutional. *See Mitchell*, 652 F.3d at 406; *Mario W.*, 2012 Ariz. LEXIS 153 at *12-13; App. 58a. The fact that three different courts purporting to apply the same jurisprudential theory produce three different results is, by itself, an indication that the theory is flawed. The fact that the theory has, essentially, no precedent or valid supporting authority and that none of the courts has addressed the repercussions of that theory outside of the narrow scope of arrestee DNA profiles further

supports this Court's grant of certiorari review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Douglas F. Gansler
Attorney General of Maryland

Katherine Winfree
Chief Deputy Attorney General

*Brian S. Kleinbord
Robert Taylor, Jr.
Assistant Attorneys General

Office of the Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6435
bkleinbord@oag.state.md.us

Counsel for Petitioner

*Counsel of Record
August 14, 2012

APPENDIX

TABLE OF CONTENTS

Page

Reported opinion of the Court of Appeals, *Alonzo Jay King, Jr. v. State of Maryland*, No. 68, Sept. Term, 2010 (filed April 24, 2012). 1a-85a

Order granting review from the Court of Appeals of Maryland, *Alonzo Jay King, Jr. v. State of Maryland*, No. 2118, Sept. Term, 2010, filed October 24, 2011. . . . . 86b

Order denying motion for reconsideration and stay of enforcement of mandate, Court of Appeals of Maryland, *Alonzo Jay King, Jr. v. State of Maryland*, No. 68, Sept. Term, 2011, filed May 18, 2012. . . . . 87b

Order granting stay of judgment and mandate of Court of Appeals of Maryland, Supreme Court of the United States, *Maryland v. Alonzo J. King, Jr.*, No. 12A48 filed July 18, 2012. . . . . 88b

Opinion granting stay of judgment and mandate of Court of Appeals of Maryland pending disposition of petition for writ of certiorari, Supreme Court of the United States, *Maryland v. Alonzo Jay King, Jr.*, No. 12A48 filed July 30, 2012. . . . . 89b-92b

IN THE COURT OF APPEALS

OF MARYLAND

No. 68

September Term, 2011

ALONZO JAY KING, JR.

v.

STATE OF MARYLAND

Bell, C.J.,
Harrell
Greene
Adkins
Barbera
Wilner, Alan M. (Retired,
Specially Assigned)
Cathell, Dale R. (Retired,
Specially Assigned),

JJ.

Opinion by Harrell, J.
Barbera and Wilner, JJ., dissent.

Filed: April 24, 2012

We consider here facial and as-applied constitutional challenges to that portion of the Maryland DNA Collection Act (the "Act") that purports to authorize State and local law enforcement authorities to collect DNA[1] samples from individuals who are arrested for a crime of violence,[2] an attempted crime of violence, a burglary, or an attempted burglary. Maryland Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-504(a)(3). Appellant, Alonzo Jay King Jr., was arrested in 2009 on first- and second-degree assault charges. Pursuant to § 2-504(a)(3) of the Act, King's DNA was collected, analyzed, and entered into Maryland's DNA database. King was convicted ultimately on the second-degree assault charge but, pending his trial on that charge, his DNA profile generated a match to a DNA sample collected from a sexual assault forensic examination conducted on the victim of an unsolved 2003 rape. This "hit" provided

---

[1] DNA means deoxyribonucleic acid. Maryland Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-501(g). DNA is the carrier of genetic information that comprises chromosomes and is individual to each person, aside from identical twins. For a comprehensive review of the science behind DNA, see *Armstead v. State*, 342 Md. 38, 673 A.2d 221 (1996).

[2] Crime of violence" means any enumerated crime in § 14-101 of the Criminal Law Article, including first-degree assault. Meaningfully for the present case, second-degree assault is not an enumerated crime of violence. Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-501(e).

the sole probable cause for a subsequent grand jury indictment of King for the rape. A later-obtained search warrant ordered collection from King of an additional reference DNA sample, which, after processing and analysis, matched also the DNA profile from the 2003 rape. King was convicted of first-degree rape and sentenced to life in prison.

Although previously we upheld the constitutionality of the Act, as applied to convicted felons, in *State v. Raines*, 383 Md. 1, 857 A.2d 19 (2004), the present case presents an extension of the statute, not present in *Raines*. Thus, we evaluate here rights given to, and withdrawn from, citizens who have been arrested, including the right to be free from unreasonable searches and seizures. Under the totality of the circumstances balancing test, see *United States v. Knights*, 534 U.S. 112, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001), we conclude, on the facts of this case, that King, who was arrested, but not convicted, at the time of his first compelled DNA collection, generally has a sufficiently weighty and reasonable expectation of privacy against warrantless, suspicionless searches that is not outweighed by the State's purported interest in assuring proper identification of him as to the crimes for which he was charged at the time. The State (through local law enforcement), prior to obtaining a DNA sample from King following his arrest on the assault charges, identified King accurately and confidently through photographs and fingerprints. It had no legitimate need for a DNA sample in order to be confident who it arrested or to convict him on the first-or second-degree assault charges. Therefore, there was no probable cause or individualized

suspicion supporting obtention of the DNA sample collection for those charges. We conclude that the portions of the DNA Act authorizing collection of a DNA sample from a mere arrestee is unconstitutional as applied to King. Although we have some trepidation as to the facial constitutionality of the DNA Act, as to arrestees generally, we cannot exclude the possibility that there may be, in some circumstances, a need for the State to obtain a DNA sample to identify an arrestee accurately.

I. Factual and Procedural Background

The tale of this case began on 10 April 2009, when appellant was arrested in Wicomico County, Maryland, on first- and second-degree assault charges unrelated to the rape charge underlying the prosecution of the present case.[3] Prior to the disposition of the assault charges, because King was charged with a crime of violence, the Act authorized collection of a DNA sample. Personnel at the Wicomico County Central Booking facility used a buccal swab to collect a DNA

---

[3] King entered an Alford plea and was found guilty in the Circuit Court for Wicomico County on 16 September 2009 of one misdemeanor count of second-degree assault stemming from his 10 April 2009 arrest. The first-degree assault charges were entered nolle prosequi. He was sentenced to four-years' imprisonment, with all but one year suspended.

sample[4] from King on the day of his arrest.[5] The sample was received and processed by the Maryland State Police Forensic Sciences Division and later analyzed by a private vendor laboratory. On 13 July

---

[4] DNA sample, under the Act, means:

> a body fluid or tissue sample that is: (1) provided by an individual who is convicted of a felony or a violation of § 6-205 or § 6-206 of the Criminal Law Article; (2) provided by an individual who is charged with: (i) a crime of violence or an attempt to commit a crime of violence; or (ii) burglary or an attempt to commit burglary; or (3) submitted to the statewide DNA data base system for testing as part of a criminal investigation.

Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-501(i).

[5] A buccal swab DNA collection requires the collector to swab up-and-down and rotate a sterile cotton swab on the interior of the cheek in the subject's mouth, with enough pressure to remove cells. This process is repeated on the other cheek with a separate cotton swab. Forensic Sci. Div., Md. State Police, Guidelines for Submitting Physical Evidence (2010), available at http://icac.mdsp.org/downloads/FSDSubmissionGuide.pdf.

2009, the DNA record[6] was uploaded to the Maryland DNA database. Detective Barry Tucker of the Salisbury Police Department received notice from the State Police, on 4 August 2009, that there had been a "hit" on King's DNA profile in an unsolved rape case.

The DNA database "hit" identified King's DNA profile as a match to a profile developed from a DNA sample collected in a 2003 unsolved rape case in Salisbury, Maryland. In that case, on 21 September 2003, an unidentified man broke into the home of Vonette W., a 53-year-old woman. The man, wearing a scarf over his face, a hat pulled over his head, and armed with a hand gun, entered Vonette W.'s bedroom, and ordered her not to look at him. While holding the gun to her head, he raped Vonette W. After the rape, he left with Vonette W.'s purse. Vonette W. called immediately her daughter for help. Salisbury Police officers arranged for the victim to be transported to Peninsula Regional Medical Center, where she underwent a sexual assault forensic examination. Semen was collected from a vaginal swab. The swab

---

[6] DNA record, under the Act, means "DNA information stored in CODIS or the statewide DNA data base system" and "includes the information commonly referred to as a DNA profile." Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-501(h). CODIS means "the Federal Bureau of Investigation's "Combined DNA Index System" that allows the storage and exchange of DNA records submitted by federal, state, and local forensic DNA laboratories." Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-501(c).

was processed and the DNA profile uploaded to the Maryland DNA database. No matches resulted at that time. Vonette W. was unable to identify the man who attacked her other than to say that he was African-American, between 20 and 25 years old, five-foot-six inches tall, and with a light-to-medium physique. Police searched the area around the victim's home and conducted interviews, but were unable to identify the attacker.

Detective Tucker presented the 4 August 2009 DNA database "hit" to a Wicomico County grand jury which, on 13 October 2009, returned an indictment against King for ten charges arising from the crimes committed against Vonette W., including first-degree rape.[7] The DNA database "hit" was the only evidence of probable cause supporting the indictment. On 18 November 2009, Detective Tucker obtained a search warrant and collected a second buccal swab from King. The second buccal swab matched also the sample collected from Vonette W. during the 2003 sexual assault forensic examination.

King filed in the Circuit Court for Wicomico County an omnibus motion that included a request to suppress evidence obtained through an illegal search and

---

[7] The complete list of charges included: first-degree burglary, third-degree burglary, first-degree rape, attempted first-degree rape, second-degree rape, attempted second-degree rape, armed robbery, robbery, handgun use in a violent crime, and carrying a handgun.

seizure.[8] On 12 February 2010, the Circuit Court held a hearing on the motion. The thrust of King's argument was that the DNA Act could not survive scrutiny under the Fourth Amendment and therefore King's arrest was invalid.[9] He argued also that the State did not collect King's first DNA sample in accordance with the procedures specified by the DNA Act and, therefore, that the indictment for the charges arising from the 2003 rape was invalid. The hearing judge solicited memoranda of law on the illegal search-and-seizure issue raised at the hearing.[10]

---

[8] This Court has criticized omnibus boilerplate motions filed routinely on behalf of defendants in criminal cases as containing unsupported "bald allegations." *See Jones v. State*, 395 Md. 97, 103 n.3, 909 A.2d 650, 655 n.3 (2006); *Denicolis v. State*, 378 Md. 646, 660-61, 837 A.2d 944, 953-54 (2003). King's omnibus defense motion requested vaguely suppression of "[e]vidence seized in this case . . . as a result of an illegal search and seizure." At both motions hearings, however, King articulated a Fourth Amendment violation as the critical illegal search and seizure and requested suppression specifically of his DNA sample. Therefore, the issue before us was preserved properly.

[9] King argued alternatively, but without much force, that DNA was not collected actually from him on 10 April 2009, after his arrest.

[10] King submitted a memorandum; the State did not.

On 26 February 2009, the hearing judge issued a memorandum opinion denying King's motion to suppress. The memorandum opinion upheld the constitutionality of the Maryland DNA Collection Act's authorization to collect DNA from arrestees, citing to this Court's holding in *State v. Raines*, 383 Md. 1, 857 A.2d 19 (2004), and concluded that the arrest of King on the 2009 assault charges and seizure of his DNA were presumed lawful; therefore, the defense bore the burden to prove that the warrant for the second DNA sample was invalid. The judge noted the analysis in *Fitzgerald v. State*, 153 Md. App. 601, 638, 837 A.2d 989, 1010 (2003) (citing *Franks v. Delaware*, 438 U.S. 154, 160, 98 S. Ct. 2674, 2678, 57 L. Ed. 2d 667, 675 (1978)), *aff'd* 384 Md. 484, 864 A.2d 1006 (2004), which lead to a conclusion that when a defendant challenges a warrant outside of its "four corners," the burden shifts to the defendant to demonstrate, by a preponderance of the evidence, that the State's supporting factual allegations to obtain the warrant are tainted by "deliberate falsehood or with reckless disregard for the truth." Because King did not allege or present evidence of falsehood or reckless disregard for the truth, the hearing judge concluded King had not met his burden under *Franks*.

On 26 March 2010, the same judge presided over a second hearing on King's motion to suppress in order to allow King to present evidence that the warrant was based on falsehood or reckless disregard for the truth. King called Michelle Groves, custodian of the Maryland State Police Forensics Division Crime Lab, as a witness. In an attempt to show that the State could not prove that all predicate requirements for

collection of a DNA sample under the Maryland DNA Collection Act (i.e., collection must be completed by an approved person[11]) were observed and therefore the warrant based on that sample was invalid, King questioned Groves about the handling and custody of the first DNA sample. Groves could not provide any records of the training or qualifications of the person who collected King's first DNA sample and could not provide affirmative evidence that King was given a required notice about the Act's expungement provisions.[12] The State countered that King had not adduced any evidence of error or irregularity in the DNA collection procedures. The hearing judge concluded that King failed to meet his burden under Franks and denied again the motion to suppress.

Ultimately, King plead not guilty to the charges arising from the 2003 rape of Vonette W., on an agreed statement of facts, in order to preserve his right to appeal the constitutional issues he raised. King was convicted and sentenced to life in prison, without the possibility of parole. On 12 October 2010, King filed timely a notice of appeal to the Court of Special Appeals, but we issued a writ of certiorari on our initiative, *King v. State*, 422 Md. 353, 30 A.3d 193

---

[11] Collection procedures, under the Act, are described in Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-504(b), (c).

[12] Expungement provisions, under the Act, are described in Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-511.

(2011), before the intermediate appellate court could decide the appeal. Appellant poses two questions for our consideration:

> 1. Did the trial court err by denying Appellant's motion to suppress DNA evidence obtained through a warrantless search conducted without any individualized suspicion of wrongdoing?
>
> 2. Did the court below improperly shift the burden of proof to the defense to demonstrate that a search or seizure made without individualized suspicion is unreasonable?

We hold that § 2-504(a)(3) of the Maryland DNA Collection Act, which allows DNA collection from persons arrested, but not yet convicted, for crimes of violence and burglary, is unconstitutional, under the Fourth Amendment totality of the circumstances balancing test, as applied to the relevant facts of this case because King's expectation of privacy is greater than the State's purported interest in using King's DNA to identify him for purposes of his 10 April 2009 arrest on the assault charges. Concluding that, in King's circumstances, his DNA was collected unconstitutionally, and the evidence presented at trial should have been suppressed as "fruit of the poisonous tree," we do not reach King's second question as it becomes moot. Accordingly, we reverse the judgment of the Circuit Court for Wicomico County and remand the case to that court for a new trial, consistent with the views expressed in this opinion.

II. Standard of Review

Reviewing a trial court's disposition of a motion to suppress evidence, we view the evidence presented at the hearing, along with any reasonable inferences drawable therefrom, in a light most favorable to the prevailing party, which, in the present situation, was the State. *Bailey v. State*, 412 Md. 349, 363, 987 A.2d 72, 80 (2010) (citing *Crosby v. State*, 408 Md. 490, 504, 970 A.2d 894, 902 (2009); *Longshore v. State*, 399 Md. 486, 498, 924 A.2d 1129, 1135 (2007)). The reviewing court defers to the fact-finding of the hearing court, unless the findings are erroneous clearly. *Id.* We apply, however, a non-deferential standard of review when making the ultimate legal determination as to whether the evidence was seized properly under the Fourth Amendment. *Williamson v. State*, 413 Md. 521, 532, 993 A.2d 626, 632 (2010) (citing *Bailey*, 412 Md. at 362, 987 A.2d at 80; *Crosby*, 408 Md. at 504-05, 970 A.2d at 902).

III. Discussion

Appellant argues that the Fourth Amendment protects mere arrestees, who are cloaked with the assumption of innocence until proven guilty, from unreasonable, warrantless, and suspicionless seizures and searches of their genetic material made pursuant to the Maryland DNA Collection Act. King maintains that the Maryland DNA Collection Act is unconstitutional facially under the Fourth Amendment, and also that the statute is invalid as applied to the facts of his case. The State counters that there is an overriding governmental interest in identifying arrestees accurately, that DNA profiles developed from arrestees under the Maryland DNA

Collection Act are used only for identification purposes (under an expansive view of what constitutes "identification"), and that arrestees have no expectation of privacy in their identity.

A. The Fourth Amendment

The Fourth Amendment to the United States Constitution provides,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment is applicable to Maryland through the Fourteenth Amendment. *See Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691, 6 L. Ed. 2d 1081, 1090, 86 Ohio Law Abs. 513 (1961); *Owens v. State*, 322 Md. 616, 622, 589 A.2d 59, 61 (1991). We evaluate Fourth Amendment challenges under the reasonableness test articulated by Justice Harlan in his concurring opinion in *Katz v. United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 516, 19 L. Ed. 2d 576, 587-88 (1967), a standard adopted by this Court in *Venner v. State*, 279 Md. 47, 51-52, 367 A.2d 949, 952 (1977). The *Katz* reasonableness test requires first that the person have an "actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize

as 'reasonable.'" 389 U.S. at 361, 88 S. Ct. at 516, 19 L. Ed. 2d at 587-88 (Harlan, J., concurring). A seizure or search will be upheld even if there is a reasonable expectation of privacy when the government has a "special need." *See Griffin v. Wisconsin*, 483 U.S. 868, 875, 107 S. Ct. 3164, 3169, 97 L. Ed. 2d 709, 718 (1987) (upholding a warrantless search of a probationer because the government had a "special need" for the "exercise of supervision to assure that restrictions are in fact observed"); *Skinner v. Ry. Labor Execs. Ass'n.*, 489 U.S. 602, 633, 109 S. Ct. 1402, 1422, 103 L. Ed. 2d 639, 670 (1989) (upholding warrantless and suspicionless alcohol and drug test for railway employees). The State does little more than mention the special needs exception in the present case, for good reason, because its narrow confines do not embrace the case at bar.

The context for evaluating the Fourth Amendment challenges where a reasonable expectation of privacy competes with government interests was set forth by the Supreme Court in *United States v. Knights*, 534 U.S. 112, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001). In Knights, the Supreme Court upheld a warrantless search of a probationer's apartment, using the "totality of the circumstances" approach set forth in *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S. Ct. 417, 421, 136 L. Ed. 2d 347, 354 (1996). *Knights*, 534 U.S. at 118, 122 S. Ct. at 591, 151 L. Ed. 2d at 505. Reasonableness in a Fourth Amendment analysis is determined

> by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is

needed for the promotion of legitimate government interests.

Knights, 534 U.S. at 118-19, 122 S. Ct. at 591, 151 L. Ed. 2d at 505 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300, 119 S. Ct. 1297, 1300, 143 L. Ed. 2d 408, 414 (1999)). The Court considered as weighty Knights's status as a probationer, which "like incarceration, is a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty." *Knights*, 534 U.S. at 119, 122 S. Ct. at 591, 151 L. Ed. 2d at 505 (citing *Griffin*, 483 U.S. at 874, 107 S. Ct. at 3168, 97 L. Ed. 2d at 717) (internal quotation omitted). Probation, noted the Court, was one point on a continuum of punishments for convicted criminals whose freedoms may be curtailed beyond those of law-abiding citizens. *Id.* Further, Knights's probation order stated clearly that warrantless searches were a condition of his probation; therefore, the Court concluded his expectation of privacy was diminished. *Knights*, 534 U.S. at 119-20, 122 S. Ct. at 591-92, 151 L. Ed. 2d at 505.

On the other side of the "totality of the circumstances" scale from the individual's privacy interest is the government interest in conducting the search. In Knights's situation, the government had a legitimate interest in his rehabilitation and protecting society from future criminal actions. *Knights*, 534 U.S. at 119, 122 S. Ct. at 591-92, 151 L. Ed. 2d at 505. The high recidivism rate of probationers fueled a strong government interest that weighed heavily against Knights's diminished expectation of privacy. *Knights*, 534 U.S. at 120, 122 S. Ct. at 592, 151 L. Ed. 2d at 506

(noting a Justice Department report that found 43% of probationers were re-arrested for a felony within three years of release). The Court concluded that the government had a legitimate interest in preventing future crimes committed by probationers by conducting warrantless searches of probationers' residences. *Knights*, 534 U.S. at 121, 122 S. Ct. at 592, 151 L. Ed. 2d at 506. Balancing Knights's reduced expectation of privacy as a probationer against the government's interests in preventing recidivism and protecting the public, the Court observed that less than "probable cause" (in the form of reasonable suspicion, rather than individualized suspicion) was required for a search of Knights's residence. *Id.*

The Supreme Court deployed later the *Knights* "totality of the circumstances" test to determine whether a suspicionless search of a parolee, conducted by a police officer on a public sidewalk, was reasonable under the Fourth Amendment. *Samson v. California*, 547 U.S. 843, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (2006). The Court concluded that, on the continuum of punishments imposed for criminal violations, a parolee has "fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation . . . ." *Samson*, 547 U.S. at 850, 126 S. Ct. at 2198, 165 L. Ed. 2d at 258. Parolees are subject to a wide range of conditions for their release, including mandatory drug tests, restrictions on personal associations and activities, psychiatric treatment, residence approval, and mandatory meetings with parole agents. *Samson*, 547 U.S. at 851, 126 S. Ct. at 2199, 165 L. Ed. 2d at 259. As in *Knights*, *Samson* focused heavily on the high recidivism rate of the

parolee population, which, in California during the relevant time, approached 70 percent. *Samson*, 547 U.S. at 853, 126 S. Ct. at 2199, 165 L. Ed. 2d at 259. The Court concluded that the government interest in re-integrating parolees, protecting society from future criminal actions, along with a statutory prohibition against "arbitrary, capricious, or harassing" searches, outweighed the parolee's diminished expectation of privacy under the "totality of the circumstances." *Samson*, 547 U.S. at 856, 126 S. Ct. at 2202, 165 L. Ed. 2d at 262.

B. The Maryland DNA Collection Act

The Maryland DNA Collection Act was enacted in 1994. The portions of the current statute challenged by Appellant were added in 2008.[13] 2008 Md. Laws 337. The stated purpose of the statute is to "analyze and type the genetic markers contained in or derived from the DNA samples;" to assist an official investigation of a crime; to identify human remains; to identify missing persons; and for "research and administrative purposes," including the development

---

[13] The amendments to the Maryland DNA Collection Act directed to arrestees are subject to sunset provisions. Absent affirmative action from the Legislature to re-enact them, §§ 2-501, 2-504, 2-505, 2-506, 2-511, 2-512, 2-513, and 2-514 will be abrogated on 31 December 2013 and replaced with sections that do not permit DNA collection from arrestees. The current provisions for collection of DNA from convicted felons, however, will remain.

of a population database[14] and to aid in quality assurance. Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-505. The 2008 amendments affected primarily § 2-501(i), Definitions[15] and § 2-504, Collection of DNA Samples.[16] 2008 Md. Laws 337.

---

[14] Population database means "a collection of DNA profiles, usually grouped by race, used for statistical evaluation, research, quality control, and protocol development of forensic DNA analysis methods." No personal identifying information is used in the population database. Md. Code Regs. 29.05.01.01(B)(25) (2011).

[15] § 2-501. Definitions.

> (i) DNA sample. -- "DNA sample" means a body fluid or tissue sample that is: (1) provided by an individual who is convicted of a felony or a violation of § 6-205 or § 6-206 of the Criminal Law Article; (2) *provided by an individual who is charged with: (i) a crime of violence or an attempt to commit a crime of violence; or (ii) burglary or an attempt to commit burglary; or* (3) submitted to the statewide DNA data base system for testing as part of a criminal investigation. Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-501(i) (emphasis added to 2008 amended text).

[16] The text added to § 2-504 that is relevant to the present case was:

(3) (i) In accordance with regulations adopted under this subtitle, a DNA sample shall be collected from an individual who is charged with: 1. a crime of violence or an attempt to commit a crime of violence; or 2. burglary or an attempt to commit burglary. (ii) At the time of collection of the DNA sample under this paragraph, the individual from whom a sample is collected shall be given notice that the DNA record may be expunged and the DNA sample destroyed in accordance with § 2-511 of this subtitle.(iii) DNA evidence collected from a crime scene or collected as evidence of sexual assault at a hospital that a law enforcement investigator considers relevant to the identification or exoneration of a suspect shall be tested as soon as reasonably possible following collection of the sample.

(d) Testing of sample from individual charged with crime under subsection (a)(3). --

(1) A DNA sample collected from an individual charged with a crime under subsection (a)(3) of this section may not be tested or placed in the statewide DNA data base system prior to the first scheduled arraignment date unless requested or consented to by the

The amendments purport to allow the State to collect DNA samples from individuals arrested for crimes (or attempted crimes) of violence or burglary prior to being

---

individual as provided in paragraph (3) of this subsection.

(2) If all qualifying criminal charges are determined to be unsupported by probable cause: (i) the DNA sample shall be immediately destroyed; and (ii) notice shall be sent to the defendant and counsel of record for the defendant that the sample was destroyed.

(3) An individual may request or consent to have the individual's DNA sample processed prior to arraignment for the sole purpose of having the sample checked against a sample that: (i) has been processed from the crime scene or the hospital; and (ii) is related to the charges against the individual.

(e) Second DNA sample. -- A second DNA sample shall be taken if needed to obtain sufficient DNA for the statewide DNA data base system or if ordered by the court for good cause shown.

(f) Failure to provide DNA sample. -- Failure of an individual who is not sentenced to a term of imprisonment to provide a DNA sample within 90 days after notice by the Director is a violation of probation. Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-504.

found guilty or pleading guilty. Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-504(a)(3). DNA samples are collected from arrestees when the individual is charged (or at a correctional facility if the arrestee is in custody) by an authorized collector trained in the collection protocols used by the Maryland State Police Crime Laboratory. Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-504(c). Samples may be collected with reasonable force, if necessary, and are mailed to the Maryland State Police Crime Laboratory within 24 hours of collection. Md. Code Regs. 29.05.01.04(C) & (M) (2011). The samples are not tested or placed in the statewide DNA system until the first scheduled arraignment of the arrestee, or earlier if the arrestee gives consent. Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-504(d).

DNA samples are analyzed in accordance with FBI standards and CODIS requirements. Md. Code Regs. 29.05.01.09(A) (2011). In the present case, King's DNA samples were sent to an approved vendor laboratory for analysis. While the specific type of scientific analysis to be employed is not prescribed by the statute, the polymerase chain reaction ("PCR") method is used commonly by laboratories to analyze DNA samples. Mary McCarthy, *Am I My Brother's Keeper?: Familial DNA Searches in the Twenty-first Century*, 86 Notre Dame L. Rev. 381, 384 (2011). In DNA analyses performed to comply with FBI/CODIS standards, PCR is used to replicate 13 core short-tandem-repeat loci. *Id.* These 13 loci were chosen by the FBI for CODIS, in response to congressional concern over privacy protections, because they are considered "non-coding" DNA that are thought not to reveal private

information.[17] H. Rep. 106-900(I), at 27 (2000) (codified at 42 U.S.C. §§ 13701-14223 (2012)) (stating that the records do not "reveal information relating to any medical condition or other trait"). Once the DNA sample is analyzed, the DNA record (a numerical representation of the information at each loci) is uploaded to the statewide searchable DNA electronic database or the FBI CODIS database. No identifying information, criminal history, photographs, or fingerprints are stored supposedly alongside the DNA record in either DNA database. CODIS and DNIS Fact Sheet, Fed. Bureau of Investigation, http://www.fbi.gov/about-us/lab/codis/codis-and-ndis-fact-sheet (last visited 19 April 2012). When the DNA database produces a match (a "hit") between an arrestee's sample and one stored previously in a database, the Maryland State Police notify the law enforcement officer who provided the sample. The original sample "hit" may be used thereafter only as probable cause to obtain a warrant to obtain a second sample and is not admissible as evidence at trial. Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-510.

If an arrestee is not convicted of the charge or

---

[17] There is, however, considerable current debate as to whether these "non-coding" or "junk" DNA provide no predictive genetic information. See Simon A. Cole, *Is the "Junk" DNA Designation Bunk?*, 102 Nw. U. L. Rev. 54, 54 (2007) (highlighting an academic debate on the significance of non-coding DNA).

charges which lead to his/her qualifying arrest(s), the DNA samples and records are required to be destroyed or expunged by the authorities. Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-511(a). There is no expungement allowed, however, if the precipitating charge or charges against an arrestee are placed on the stet docket or the arrestee received probation before judgment. Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-511(f)(2). The Act provides also for penalties for misuse of DNA records, unauthorized testing of DNA samples, or wilful failure to destroy DNA samples. Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-512.

In *Raines*, 383 Md. at 25, 857 A.2d at 33, a plurality of this Court upheld the constitutionality, against a Fourth Amendment challenge, of the then-extant DNA collection statutory scheme, which, prior to the 2008 amendments, provided for collection of DNA samples only from individuals convicted of felonies, fourth-degree burglary, or breaking and entering into a vehicle. The Court, however, was divided deeply in reaching that result. The plurality opinion was authored by Judge Cathell. Two members of the four judge majority authored separate concurring opinions.

Raines was convicted of two separate robberies committed in 1996. In 1999, while serving a sentence in prison for a crime unrelated to the robberies, his DNA was collected pursuant to the Act as it then existed, because the 1996 robberies were qualifying felonies. *Raines*, 383 Md. at 5 n.5, 857 A.2d at 22 n.5 (plurality opinion). In 2002, the DNA profile from a

1996 unsolved rape was uploaded to the statewide database and found to match Raines's DNA profile collected in 1999. *Raines*, 383 Md. at 6, 857 A.2d at 22 (plurality opinion). Using the DNA database hit as probable cause, the State obtained a search warrant to obtain a saliva sample from Raines in February 2003. *Raines*, 383 Md. at 6-7, 857 A.2d at 22 (plurality opinion). As a result of the second DNA profile match and the testimony of the 1996 rape victim, a grand jury returned an indictment against Raines for first- and second-degree rape and robbery. *Raines*, 383 Md. at 7, 857 A.2d at 22 (plurality opinion). Prior to his trial on the rape charges, Raines moved to suppress the DNA evidence, asserting that the original search was unconstitutional. *Raines*, 383 Md. at 7, 857 A.2d at 23 (plurality opinion). The motions court agreed. *Id.* The plurality opinion, on appeal, reversed the suppression of the evidence, noting that nearly every federal and state court that had decided an analogous question upheld against Fourth Amendment attack the collection of DNA from convicted felons. *Raines*, 383 Md. at 12, 857 A.2d at 25 (plurality opinion). Using the balancing test for determining whether a search is reasonable under the Fourth Amendment, the plurality upheld the constitutionality of the Maryland DNA Collection Act, as applied to convicted felons. *Raines*, 383 Md. at 18, 857 A.2d at 29.

On the privacy interest side of the scales of the balancing test, the Court considered Raines's status as a convicted and incarcerated person as one with "severely diminished expectation of privacy." *Raines*, 383 Md. at 25, 857 A.2d at 33 (plurality opinion). The plurality opinion diluted further Raines's expectation

of privacy by crediting that the purpose of the DNA collection was to "identify" convicted felons; no incarcerated individual has an expectation of privacy in his or her identity. *Id.* The Court distinguished the interest in searching for "identification" from searching "ordinary individuals for the purpose of gathering evidence against them in order to prosecute them for the very crimes that the search reveals." *Id.* Using the *Knights* test, the Court concluded that there is

> no reason why a search cannot be reasonable absent an individualized suspicion in the limited circumstances of this case, where the individual's expectation of privacy was even more limited than in *Knights*, the government intrusion, a buccal swab, was minimal at most and the government objective is as strong as in *Knights*.

Raines, 383 Md. at 17, 857 A.2d at 29 (plurality opinion). A government interest highlighted in *Raines* was to identify recidivists, persons involved with crimes, and unidentified bodies. 383 Md. at 21, 857 A.2d at 31 (plurality opinion).

Judge Raker's concurring opinion disagreed with the plurality opinion as to its conclusion of the severely limited expectation of privacy a convicted felon has in his/her bodily fluids, but upheld the statute based on her acceptance of the analogy between fingerprints and DNA profiles as providing purely identifying information. *Raines*, 383 Md. at 44-45, 857 A.2d at 45 (nodding to the State's assertion that a DNA profile is just a series of numbers, similar to a social security

number). In a separate concurring opinion, Judge Wilner criticized the plurality opinion's characterization of the State's interest in the DNA as simply identification, calling it "misleading even to suggest, much less hold, that this program is not designed for the predominant purpose of providing evidence of criminality." *Raines*, 383 Md. at 51, 857 A.2d at 49. He conceded, however, that convicted criminals have a high rate of recidivism and that DNA's reliability serves the government's interest in identification in the same way as fingerprints and photographs do. *Raines*, 383 Md. at 51-52, 857 A.2d at 49 (Wilner, J., concurring).

In our next relevant case to consider the Fourth Amendment implications of the Act, *Williamson v. State*, 413 Md. 521, 526, 993 A.2d 626, 629 (2010), a woman told police in 1994 that Williamson had raped her. A sexual assault examination was performed and vaginal swab collected (but no DNA was analyzed). *Id.* Williamson entered ultimately an Alford plea to battery in the case. *Id.* In 2002, a different woman told police that an unknown assailant raped her, a sexual assault forensic examination was performed, and a vaginal swab was collected. *Williamson*, 413 Md. at 526, 993 A.2d at 629. The DNA was analyzed and uploaded to the database, but there were no DNA profile matches. *Williamson*, 413 Md. at 526-27, 993 A.2d at 629-30. In 2005, Anne Arundel County Police received a financial grant to be used to solve cold cases. *Williamson*, 413 Md. at 527, 993 A.2d at 630. Pursuant to the grant, the police analyzed the vaginal swab from the 1994 alleged rape, which resulted in a match to the DNA profile in the 2002 rape. *Id.* Police

suspected Williamson of both rapes. *Id.* After being arrested on an unrelated open warrant and while he was held in a police interrogation room, Williamson was given a McDonald's meal[18] by the police. *Id.* He drank from the drink cup and left the debris behind when he was taken from the room. *Id.* The police recovered the discarded cup and swabbed it for DNA. *Id.* The DNA thus obtained was analyzed and the results uploaded to the database, yielding a match to the specimens obtained from the 1994 and 2002 rapes. *Williamson*, 413 Md. at 528, 993 A.2d at 630. Williamson was indicted by a grand jury for charges stemming from the 2002 rape. *Williamson*, 413 Md. at 528, 993 A.2d at 631.

Applying the two-part test from *Katz*, the Court concluded that Williamson abandoned the McDonald's cup in the police station and, therefore, could expect reasonably that the police might collect and investigate the cup. *Williamson*, 413 Md. at 536-37, 993 A.2d at 635. Williamson argued that, even if the cup was seized lawfully, the analysis of his DNA sample constituted a second and subsequent search and seizure for the purposes of the Fourth Amendment, which required a warrant. *Williamson*, 413 Md. at 539, 993 A.2d at 637. In dicta, the Court suggested that "[h]ad the police compelled Williamson to give a

---

[18] The record does not specify whether Williamson was provided with a McDonald's Extra Value Meal. If that was what he received, it appears that the State received the "extra value," not Williamson.

DNA sample as a pre-trial detainee, Williamson's argument may have had some weight." *Williamson*, 413 Md. at 540, 993 A.2d at 637. Relying on the declaration in *Raines* that DNA profiles produced under the authority of the Maryland DNA Collection Act provide identification of the person only, rather than being concerned with the vast amount of genetic information contained within the actual DNA sample, the Court concluded that, because Williamson abandoned the cup, there was no Fourth Amendment search implicated by the analysis of the DNA sample. *Williamson*, 413 Md. at 547, 993 A.2d at 641 (analogizing the abandoned DNA on the cup to a garbage bag left outside the curtilage of a home).

Most recently, in *Raynor v. State*, 201 Md. App. 209, 29 A.3d 617 (2011), our colleagues on the Court of Special Appeals tackled another facet of analyzing a reasonable expectation of privacy in one's DNA under Fourth Amendment jurisprudence. Appellant Raynor became a suspect in an unsolved rape case and was asked by State Police to come to the local barracks to talk about the investigation. *Raynor*, 201 Md. App. at 214-15, 29 A.3d at 620. The police asked Raynor for a DNA sample; he refused. *Raynor*, 201 Md. App. at 215, 29 A.3d at 621. During the interview, however, Raynor rubbed repeatedly his hands up and down the arm-rests of the chair in which he was seated. *Id.* After the interview, the police swabbed the arm-rests and obtained a viable DNA sample that, once analyzed, matched the sample taken from a rape kit obtained from the victim. *Raynor*, 201 Md. App. at 216, 29 A.3d at 621. The trial court refused, on Raynor's motion, to suppress the DNA evidence.

Raynor, 201 Md. App. at 216, 29 A.3d at 621-22. On appeal, the thrust of Raynor's argument (similar to Williamson's, *supra*) was that he had a reasonable expectation of privacy in the DNA within his skin cells, despite the latter having been gathered lawfully by the police from the arm-rests. *Raynor*, 201 Md. App. at 217, 29 A.3d at 622. The Court of Special Appeals, relying principally on the reasoning of Judge Raker's concurring opinion in *Raines*, concluded that "even if appellant could demonstrate a subjective expectation of privacy in his DNA profile, he nonetheless had no objectively reasonable expectation of privacy in it because it was used for identification purposes only." *Raynor*, 201 Md. App. at 222, 29 A.3d at 625. The intermediate appellate court reasoned that collection of the DNA from the chair was analogous to collection of a latent fingerprint and, therefore, was not a constitutionally-protected search. *Id.*

C. The State of Fourth Amendment Challenges to Analogous Federal and other State Statutes

Courts have upheld overwhelmingly against Fourth Amendment challenges federal and state statutes authorizing warrantless, suspicionless DNA collection from convicted criminals, including incarcerated prisoners, parolees, and probationers. Federal and state courts are divided, however, on the constitutionality of requiring mere arrestees to submit to DNA sample collection. At the heart of this debate (and the present case) is the presumption of innocence cloaking arrestees and whether legitimate government interests outweigh the rights of a person who has not been adjudicated guilty of the charged crime, and is

somewhere closer along the continuum to a person who is not charged with a crime than he or she is to someone convicted of a crime.

In *People v. Buza*, 197 Cal. App. 4th 1424, 129 Cal. Rptr. 3d 753, 755 (Cal. Ct. App. 2011), *cert. granted*, 132 Cal. Rptr. 3d 616, 262 P.3d 854 (Cal. 2011), the First Appellate District, Division Two, of the Court of Appeal of California held unconstitutional facially the section of California's Forensic Identification Database and Data Bank Act of 1998 ("California DNA Collection Act") (Cal. Penal Code § 296 (2011)), that authorized the taking of a DNA sample from all adults arrested or charged with a felony.[19] Mark Buza was arrested for arson and vandalism and asked to provide a DNA sample, as required by the California Act; he refused. *Id.* Buza was informed that, under the California Act, refusal to provide a DNA sample after arrest was itself a misdemeanor offense. *Buza*, 129

---

[19] The California DNA Collection Act, as to its treatment of arrestees, is similar substantially to Maryland's DNA Collection Act. The same 13 loci are analyzed and uploaded to the state DNA database, which is connected to CODIS. No identifying information is included with the DNA profile. There are statutory protections against unauthorized use or disclosure of the database information. The statutes' differ, however, in that California does not require waiting until a scheduled arraignment for analysis of the sample and arrestees must request expungement, rather than the automatic procedures in the Maryland DNA Collection Act.

Cal. Rptr. 3d at 756. The State charged Buza, on information, with arson, vandalism, and refusal to provide a DNA sample under the California DNA Collection Act. *Id.* Buza moved for an acquittal on the charge of failure to provide a DNA sample, contending that being charged with a felony was not a sufficient basis for the state to require a DNA sample. *Id.* His motion was denied, yet he continued to refuse to provide a DNA sample. *Id.* Buza was convicted on all charges. *Id.* The court ordered law enforcement to use "reasonable force" to extract the DNA sample. *Id.* Buza was sentenced to 16 months, including six months for his refusal to provide DNA. *Id.* He was informed his DNA would be uploaded into the database. *Id.*

Buza appealed his conviction for failure to provide a DNA sample, arguing that, as an arrestee, he was entitled to the presumption of innocence and had the right, under the Fourth Amendment, to be free of unreasonable searches and seizures. *Buza*, 129 Cal. Rptr. 3d at 755. In analyzing Buza's facial attack on the constitutionality of the statute authorizing DNA collection from arrestees, the court summarized relevant cases upholding DNA collection of convicted offenders, highlighting the narrow grounds on which these cases were decided or the divided views expressed by the deciding courts. *Buza*, 129 Cal. Rptr. 3d at 762 (noting the "limited nature" of the holding in *United States v. Kincade*, 379 F.3d 813, 836 (9th Cir. 2004), applying only to "lawfully adjudicated criminals whose proven conduct substantially heightens the government's interest in monitoring them," and the Ninth Circuit in *United States v. Kriesel*, 508 F.3d 941,

948-49 (9th Cir. 2007), because its holding did not apply to arrestees).

The *Buza* court looked also to opinions that evaluated DNA collection from arrestees or pre-trial detainees. 129 Cal. Rptr. 3d at 763. In *Friedman v. Boucher*, 580 F.3d 847, 851 (9th Cir. 2009), a Montana law enforcement officer requested a DNA sample (under a Montana statute authorizing collection from convicted felons) from a pre-trial detainee who had been convicted, sentenced, and served time to completion in Nevada previously for an unrelated crime.[20] The *Friedman* court concluded that, despite the state's assertions that pre-trial detainees have a limited expectation of privacy and that the government has a legitimate interest in collecting DNA samples for its database, forcible extraction of DNA, without a warrant and in the absence of individualized suspicion, or for the purposes of solving unsolved crimes, was unconstitutional as applied to Boucher. 580 F.3d at 851, 856. The court noted that government interests that would offset the expectation of privacy in certain circumstances (prison security or supervision and integration of parolees) are not present with pre-trial detainees and, additionally, Montana's constitution provides greater privacy protections than the Fourth Amendment. *Friedman*, 580 F.3d at 858 (citing government interests in *Samson*, 547 U.S. at 856, 126

---

[20] Friedman was convicted and served his sentence in Nevada and was not under parole or probationary supervision by Montana. *Friedman v. Boucher*, 580 F.3d 847, 854 (9th Cir. 2009).

S. Ct. at 2202, 165 L. Ed. 2d at 262). In response to the government's argument that the search was reasonable because of the reduced privacy rights of pre-trial detainees, the court responded by noting that the Supreme Court has not allowed suspicionless searches of pre-trial detainees for reasons other than prison security. *Friedman*, 580 F.3d at 856-57. Quoting from *Schmerber v. California*, 384 U.S. 757, 770, 86 S. Ct. 1826, 1835, 16 L. Ed. 2d 908, 919 (1966), the court emphasized "[t]he importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great." *Friedman*, 580 F.3d at 857. The *Friedman* court distinguished the holdings in *Kincade* and *Kriesel*, discussed *supra*, because those cases addressed convicted criminals and Friedman was only a pre-trial detainee for the purposes of the Montana statute. *Id.*

In *United States v. Pool*, 621 F.3d 1213 (9th Cir. 2010), a divided panel of the Ninth Circuit affirmed the holding of a federal magistrate judge who found constitutional, against an as-applied challenge, provisions of the Bail Reform Act of 1966 (18 U.S.C. § 3142(b), (c)(1)(A) (2009)), and the DNA Fingerprint Act of 2005 (42 U.S.C. § 14135a (2009)) requiring Pool, as an arrestee, to provide a DNA sample as a condition of his pre-trial release.[21, 22] The majority opinion in *Pool*,

---

[21] The Ninth Circuit granted a rehearing en banc and directed that the three judge panel opinion, *United States v. Pool*, 621 F.3d 1213 (9th Cir. 2010), not be used as precedent by any court. *United States v. Pool*,

adopting the magistrate judge's approach, applied the totality of the circumstances test and concluded that a "judicial or grand jury finding of probable cause" is a "watershed event" that tips the scales in favor of "the government's interest in definitively determining the defendant's identity," at the expense of a "defendant's privacy interest in giving a DNA sample as a condition of pre-trial release . . . ." 621 F.3d at 1219, 1226. The magistrate likened the DNA sample requirement to other conditions of pre-trial release that limit liberty, including electronic monitoring and mandatory curfews. *Pool*, 621 F.3d at 1217. The appeals-court-panel majority concluded that Pool had not shown any greater privacy interest in his DNA

---

646 F.3d 659 (9th Cir. 2011). While the en banc rehearing was pending, Pool pleaded guilty, and the Ninth Circuit vacated the three judge panel opinion and dismissed the appeal as moot. *United States v. Pool*, 659 F.3d 761 (9th Cir. 2011).

[22] The Bail Reform Act of 1966 allows a judge to order that an individual who has been charged, but is released on his or her recognizance or an unsecured appearance bond while awaiting trial, "cooperate in the collection of a DNA sample" if he or she is arrested or facing federal charges. 18 U.S.C. § 3142(b) (2009). The DNA Fingerprint Act of 2005 provided the authority to collect DNA samples from persons "who are arrested, facing charges, or convicted from non-United States persons who are detained under the authority of the United States." 42 U.S.C. § 14135a(a)(1)(A) (2009).

than had Kincade (a convict), *supra*, because the DNA statute required that only identifying numbers be used in the reporting system. *Pool*, 621 F.3d at 1222. The competing government interests included allowing "the government to ensure that the defendant did not commit some other crime[;] . . . discourage[d] a defendant from violating any condition of his or her pretrial release"; and served the same purpose of identifying potentially dangerous individuals to the public, whether arrestees or convicts. *Pool*, 621 F.3d at 1223.

In dissent, Judge Schroder countered that *United States v. Brown*, 563 F.3d 410, 414-15 (9th Cir. 2009), required that the government bear the burden of showing that searches and seizures are reasonable under a Fourth Amendment exception. *Pool*, 621 F.3d at 1237. Under its application of the balancing test, the dissent concluded that Pool's expectation of privacy had not been reduced by a conviction and, therefore, the government's asserted interest in *Pool* was obliged, in order to overcome Pool's expectation, to be even more significant than those recognized with regard to convicts; the government may not rely on a "generalized interest in preventing the commission of crimes by pretrial defendants." *Pool*, 621 F.3d at 1237-38. The dissent remarked also on the difference between the DNA profile and the DNA sample; although the former contains numeric identifiers only, the latter contains the entire genetic makeup of an individual. *Id.*

In *United States v. Mitchell*, 652 F.3d 387 (3rd Cir. 2011), *cert denied*, ___ U.S. ___, ___ S Ct. ___, 182 L.

Ed. 2d 558 (2012), a divided Third Circuit, sitting en banc, reached a similar conclusion as did the majority in *Pool, supra*.[23] Mitchell was indicted for one count of attempted possession with intent to distribute cocaine. *Mitchell*, 652 F.3d at 398. While in pre-trial detention, he refused to give a DNA sample demanded pursuant to the federal DNA Collection Act (42 U.S.C. § 14135a(a)(1)(A) (2011)). *Id.* His refusal was upheld by the federal district court. *Mitchell*, 652 F.3d at 398. On appeal, the Third Circuit reversed. *Mitchell*, 652 F.3d at 402. Mitchell argued that collection of DNA samples from arrestees and pre-trial detainees under the DNA Collection Act constituted an unreasonable search and seizure, violating the Fourth Amendment. *Id.* The parties disagreed whether Mitchell had mounted a facial or as-applied constitutional challenge in the trial court, so the appellate court, following the guidance in *United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010), considered both types of challenge. *Mitchell*, 652 F.3d at 405.[24] The court, following the

---

[23] Mitchell filed a petition for writ of certiorari on 22 November 2011(application number 11A384) in the United States Supreme Court. The petition was denied on 19 March 2012.

[24] In *United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010), there was ambiguity as to whether Marcavage advanced an as-applied or facial constitutional attack. The court concluded that Marcavage's "hybrid" approach to advancing both attacks was permissible and proceeded to analyze the facial challenge first because the burden was

direction in *Connection Distribution Co. v. Holder*, 557 F.3d 321, 327-28 (6th Cir. 2009), that "[t]he usual judicial practice is to address an as-applied challenge before a facial challenge," considered first the constitutionality of the statute as applied to the facts in Mitchell's case. *Mitchell*, 652 F.3d at 405 (internal quotation omitted) (internal citation omitted).

Using the *Knights* totality of the circumstances test, the *Mitchell* court majority concluded that there are two separate searches when DNA is collected. *Mitchell*, 652 F.3d at 406. The first is the physical collection, usually via a buccal swab or a blood draw. *Id.* The court concluded that the physical intrusion was quick and painless (relatively so) and, therefore, a minimal invasion, and did not weigh in the defendant's favor. *Mitchell*, 652 F.3d at 407 (citing *Skinner*, 489 U.S. at 625, 109 S. Ct. at 1417, 103 L. Ed. 2d at 665; *Nicholas v. Goord*, 430 F.3d 652, 656 n.5 (2d Cir. 2005)). The second search is the processing of the DNA sample and creation of the DNA profile. *Mitchell*, 652 F.3d at 407. Mitchell's challenge pointed to the vast amount of personal data contained within a DNA sample and the potential for misuse of the data. *Id.* The court, however, was not persuaded by Mitchell's argument, relying on the numerous statutory protections of the data and the "junk" nature of the 13 loci used to create the profile. *Mitchell*, 652 F.3d at 408. The court embraced an analogy between fingerprints and DNA profiles, treating both as routine

---

"significantly heavier" and could be decided (against him) quickly. *Id.*

booking procedures, and concluded that pre-trial detainees have a diminished privacy interest relative to means to ascertain and confirm their identities. *Mitchell*, 652 F.3d at 411 ("[I]t is 'elementary' that blanket fingerprinting of individuals who have been lawfully arrested or charged with a crime does not run afoul of the Fourth Amendment.") (quoting *Smith v. United States*, 324 F.2d 879, 882 (D.C. Cir. 1963))).

The court in *Mitchell* conceded that the government's interests in obtaining DNA from an arrestee are not as strong as with convicts, probationers, or parolees. 652 F.3d at 413. Mitchell maintained that the interest in law enforcement is "equally well served by collecting DNA samples post-conviction," however, the court was persuaded by the government's argument that there is a strong interest in identifying arrestees. *Id.* Quoting from *United States v. Sczubelek*, 402 F.3d 175, 185 (3rd Cir. 2005), the *Mitchell* court reiterated that a criminal may take "unusual steps to conceal not only his conduct, but also his identity" by using disguises, changing names, or changing physical features. 652 F.3d at 414. Such attempts by criminals to obfuscate their identities amplify the government's need to use DNA to identify accurately pre-trial detainees or arrestees, concluded the court. *Id.* The majority, however, made no mention of evidence that Mitchell had attempted to conceal his identity or that the government had any difficulties determining Mitchell's identity without resorting to a DNA profile.

The *Mitchell* majority, quoting from *Haskell v. Brown*, 677 F. Supp. 2d 1187, 1199 (N.D. Cal. 2009),

perceived two components to identity: "who that person is (the person's name, date of birth, etc.) and what that person has done (whether the individual has a criminal record, whether he is the same person who committed an as-yet unsolved crime across town, etc.)." *Id.* The court placed great weight on the second component, noting that a person's criminal record has important ramifications for pre-trial release considerations. *Id.* The court conceded, however, that "in comparison to the probationer cases, the interests in supervision and prevention of recidivism are much diminished, if not absent, in the context of arrestees and pretrial detainees." *Mitchell*, 652 F.3d at 415 n.25 (quoting *United States v. Scott*, 450 F.3d 863, 874 (9th Cir. 2006) ("That an individual is charged with a crime cannot, as a constitutional matter give rise to any inference that he is more likely than any other citizen to commit a crime if he is released from custody.")). Concluding that the government's interest in identifying arrestees was sufficient to render the DNA Act constitutional, as applied to Mitchell, the court resolved that Mitchell's facial challenge to the statute failed. *Mitchell*, 652 F.3d at 415-16.

A strongly worded dissent criticized the *Mitchell* majority's conclusions, asserting that it gave "short shrift" to an arrestee's privacy interest by reducing it only to an interest in identity. 652 F.3d at 416 (Rendell, J., dissenting). Judge Rendell maintained that statutory limitations on the use of DNA profiles, "though not wholly irrelevant, are not panaceas, . . . and cannot offset the severe invasion of privacy that takes place when an arrestee's DNA is seized and searched." *Id.* The dissent described the privacy

interest of arrestees, "while diminished in certain, very circumscribed situations, are not so weak as to permit the Government to intrude into their bodies and extract the highly sensitive information coded in their genes." *Mitchell*, 652 F.3d at 421 (Rendell, J., dissenting). Objecting to the majority's characterization of the government interest as simply "identification," Judge Rendell countered that the purpose of collecting arrestee and pre-trial detainee DNA

> is not to "identify" the arrestee in the sense of allowing law enforcement to confirm that the correct person has been arrested or keeping records of who has been in federal custody, but to use those profiles and the information they provide as evidence in the prosecution and to solve additional past and future crimes.

Mitchell, 652 F.3d at 422-23 (Rendell, J., dissenting). Quoting the dissenting opinion in *Kincade*, Judge Rendell argued that "[t]he collection of a DNA sample . . . does not 'identify' an [arrestee or pre-trial detainee] any more than a search of his home does — it merely collects more and more information about that [arrestee or pre-trial detainee] that can be used to investigate unsolved past or future crimes." *Mitchell*, 652 F.3d at 423 (Rendell, J., dissenting) (quoting *Kincade*, 379 F.3d at 857 n.16 (Reinhardt, J., dissenting)). Relying on the presence of the expungement provision in the statute, the dissent bolstered its argument against a simplistic "identification" purpose being the sole government interest, stating that

> [i]f the Government's real interest were in maintaining records of arrestees' identifies, there would be no need to expunge those records upon an acquittal or failure to file charges against the arrestee. Indeed, this statutory provision serves as an admission that the fact of *conviction*, not of mere arrest, justifies a finding that an individual has a diminished expectation of privacy in his DNA.

Mitchell, 652 F.3d at 423 (Rendell, J., dissenting). Attacking further the purported "identification only" usage of the DNA sample offered-up by the government, Judge Rendell likened the process to "the Government seiz[ing] personal medical information about you but . . . only us[ing] the subset of that information that serves to identify you." *Mitchell*, 652 F.3d at 424 (Rendell, J., dissenting).

The dissent dissected also the analogy between fingerprints and DNA, quoting from *Sczubelek*, 402 F.3d at 197-98, which opined that collecting DNA "requires production of evidence below the body surface which is not subject to public view," as opposed to fingerprints which are accessible readily on the surface of the skin. *Mitchell*, 652 F.3d at 424-25 (Rendell, J., dissenting) (internal citation omitted). Judge Rendell rejected the reasoning of the majority in *Pool*, that probable cause for a particular crime is a "watershed event," observing that *Pool* "never explains why a finding of probable cause in connection with a particular crime justifies the collection of DNA profiles for use in connection with other crimes for which, by definition, there has been no finding of probable cause

or, indeed, any suspicion at all." *Mitchell*, 652 F.3d at 427 (Rendell, J., dissenting). Finally, the dissent attacked the foundation of the majority's Fourth Amendment analysis by noting that there are clearly defined exceptions to the general prohibition on warrantless searches, including reasonable suspicion of imminent danger and prison and jail searches. *Mitchell*, 652 F.3d at 428 (Rendell, J., dissenting) (citing *Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883, 20 L. Ed. 2d 889, 909 (1968); *Florence v. Burlington Cnty.*, 621 F.3d 296, 307 (3d Cir. 2010)); *see generally Kincade*, 379 F.3d at 822-24). Concluding that none of those exceptions were applicable and that the majority opinion should not have accepted non-specific, broad government goals of fighting crime to justify a Fourth Amendment violation under an analysis that seemed more like a First Amendment "rational basis" review, the dissent advocated the more stringent approach required for Fourth Amendment analyses. *Mitchell*, 652 F.3d at 428 (Rendell, J., dissenting).

The final major case considered by the *Buza* court was *Haskell,* 677 F. Supp. 2d at 1187, which denied a preliminary injunction to enjoin collection of a DNA sample pursuant to the California DNA Collection Act. *Buza*, 129 Cal. Rptr. 3d at 753. Plaintiffs in *Haskell* mounted a facial challenge to the California Act under the Fourth Amendment. 677 F. Supp. 2d at 1192. The *Haskell* court, tracking the reasoning generally of *Kincade* and *Kriesel*, concluded that, although arrestees have a greater privacy interest than prisoners, that interest is less than that of a member of the general population; therefore, arrestees are

subject to a broad range of restrictions. *Haskell*, 677 F. Supp. 2d at 1196. The court adopted the fingerprint/DNA analogy accepted by other courts and concluded that an arrestee's privacy interest "is not weighty." *Haskell*, 677 F. Supp. 2d at 1198. Following the reasoning of *Mitchell*, the *Haskell* court concluded that identification has two components and that the government has a legitimate interest in not only the name and date of birth of an arrestee, but also his or her criminal history (even criminal acts as yet undiscovered). *Haskell*, 677 F. Supp. 2d at 1199. The court was concerned that "[a]n individual might wear gloves at some point, thwarting fingerprint identification, or wear a mask, thwarting the use of photographs," and, therefore, DNA sampling was a more accurate and necessary form of identification. *Id.*

In its sifting of the relevant cases, the *Buza* court rejected the DNA/fingerprint analogy relied upon in *Mitchell*, *Pool*, and *Haskell*. *Buza*, 129 Cal. Rptr. 3d at 768. Similar to the dissent in *Mitchell*, *Buza* focused on whether the use of the DNA profile could overcome the "full extent of the search that has taken place." *Buza*, 129 Cal. Rptr. 3d at 768 (citing *Mitchell*, 652 F.3d at 416 (Rendell, J., dissenting)). The search referred to was the extraction of the entire human genome, which is necessary to develop the DNA profile uploaded to CODIS. *Buza*, 129 Cal. Rptr. 3d at 769. The court, although acknowledging that the so-called "junk DNA" is not thought currently to code for genetic information, predicted advances in scientific technology which, along with the perpetual preservation of the DNA sample (not just the DNA profile), creates privacy concerns. *Id.* Noting that

requiring fingerprinting after arrest has never undergone Fourth Amendment scrutiny, the *Buza* court rejected the notion that simply because fingerprinting is commonplace that DNA should take its place readily as a routine booking procedure, without additional scrutiny.[25] *Id.*

As to the governmental interest in "identification" touted by the *Haskell* court, the court in *Buza* countered that the purpose of DNA sampling was investigation actually. 129 Cal. Rptr. 3d at 770-71. Fingerprints taken for identification "verify that the person who is fingerprinted is really who he says he is," while those taken for investigatory purposes are taken "to connect [the person fingerprinted] to a crime with which he was not already connected." *Buza*, 129 Cal. Rptr. 3d at 770 (quoting *United States v. Garcia-Beltran*, 389 F.3d 864, 864 (9th Cir. 2004)). Fingerprints obtained for identification are admissible in court, while those obtained for investigatory purposes must be suppressed if their purpose was to "connect [the arrestee] to alleged criminal activity." *Id.* (quoting *Garcia-Beltran*, 389 F.3d at 865; citing *Hayes v. Florida*, 470 U.S. 811, 105 S. Ct. 163, 84 L.

---

[25] The court noted with some concern the relatively facile interpretive evolution of the DNA Act occurring between *Kincade* (certain convicted felony offenders), *Kriesel* (all convicted felony offenders), *Pool* (individuals charged with felony offenses), and then *Haskell* (arrestees who have not had a judicial determination of probable cause). *People v. Buza*, 129 Cal. Rptr. 3d 753, 770 (Cal. Ct. App. 2011).

Ed. 2d 705 (1985); *Davis v. Mississippi*, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969)). Addressing the far-reaching, two-component definition of "identification" advanced in *Haskell*, the *Buza* court reasoned that the very nature of the second component (the criminal history of, or as-yet-unsolved crimes committed by, that person) implies an "investigatory" purpose. 129 Cal. Rptr. 3d at 753. The realities of the DNA processing system mean that identification does not happen immediately (noting an average processing time of 31 days) and the DNA database does not contain identification information. *Buza*, 129 Cal. Rptr. 3d at 772-73. Collection and processing of DNA samples in California requires that fingerprints be used alongside the DNA sample to "identify the subject" specifically, lending further support to the conclusion that the purpose of the collection is not identification. *Buza*, 129 Cal. Rptr. 3d at 773 (quoting *FAQs: Collection Mechanics, question 1.1*, http://ag.ca/gov/bfs/content/faqphp#mecahnics (last visited 4 Aug. 2011)). The identity-obscuring initiatives of concern in *Haskell* and the comment in *Kincade* that there is no way to avoid leaving DNA at the scene of the crime were deemed by the *Buza* court as weighing heavily in favor of concluding that DNA sampling is actually for investigatory purposes, as these relate directly to crime scene investigation. *Buza*, 129 Cal. Rptr. 3d at 773-74 (noting that an "arrestee cannot mask his or her identity by wearing gloves while being fingerprinted" or by wearing a mask while being photographed during routine booking procedures). The court concluded, from the text of the California DNA Collection Act, that the purpose of the Act was "unquestionably consonant" with the second

component of identification, which is an investigatory process essentially. *Buza*, 129 Cal. Rptr. 3d at 774. The California Act "involves a programmatic warrantless search of all arrestees' DNA, without individualized suspicions and prior to any judicial determination of probable cause, much less guilt." *Buza*, 129 Cal. Rptr. 3d at 780. Because the purpose is "to determine whether the arrestee can be connected to a past unsolved crime and to create a databank through which he or she may now or in the future be connected to a new offense," the California DNA Collection Act did not meet any of the special needs exceptions and a generalized interest in crime fighting did not outweigh the privacy interests of mere arrestees. *Id.*

The Court of Appeals of Minnesota weighed-in on the topic, in a certified question context, finding facially unconstitutional a Minnesota statute that required charged defendants to provide a DNA sample, after a judicial finding of probable cause, but prior to a conviction. *In re Welfare of C.T.L.*, 722 N.W.2d 484, 486 (Minn. Ct. App. 2006). In *C.T.L.*, a juvenile was charged with fifth-degree assault and aiding and abetting a first-degree aggravated robbery. *Id.* The State of Minnesota ordered the juvenile to provide a biological specimen for DNA analysis pursuant to Minn. Stat. § 299C105 (Supp. 2005).[26] *Id.* The

---

[26] The Minnesota DNA statute provides for destruction of the DNA sample if the person is found not guilty or the charges against a person are later dismissed. *In re Welfare of C.T.L.*, 722 N.W.2d 484

juvenile moved for an order certifying the question of the statute's facial constitutionality.[27] *Id.* The court began its analysis with the premise that outside of "a few specifically established and well-delineated exceptions," searches conducted "outside the judicial process, without prior approval by a judge or magistrate[,] are *per se* unreasonable." *C.T.L.*, 722 N.W. 2d at 488 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 454-45, 91 S. Ct. 2022, 2032, 29 L. Ed. 2d 564, 576 (1971)). Drawing on the holding of *Schmerber*,[28] the Minnesota court concluded that

---

(Minn. Ct. App. 2006).

[27] The certified question was

> Do the portions of Minn. Stat. § 299C.105, subd. 1(a)(1) and (3) (Supp. 2005), that direct law-enforcement personnel to take a biological specimen from a person who has been charged with an offense, but not convicted, violate the Fourth Amendment to the United States Constitution and Article I, Section 10, of the Minnesota Constitution?

C.T.L., 722 N.W. 2d at 486-87.

[28] *Schmerber* involved a defendant who was arrested for drunk driving based on the probable cause of the smell of alcohol and his blood-shot, watery, and glassy eyes. *Schmerber v. California*, 384 U.S. 757, 769, 86 S. Ct. 1826, 1835, 16 L. Ed. 2d 908, 919 (1966).

"establishing probable cause to arrest a person is not, by itself, sufficient to permit a biological specimen to be taken from the person without first obtaining a search warrant." *C.T.L.*, 722 N.W.2d at 490 (noting the holding in *Schmerber*, 384 U.S. at 769-70, 86 S. Ct. at 1835, 16 L. Ed. 2d at 919, that "[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained").

The State in *C.T.L.* advanced a *Pool* "watershed event" argument as regards the initial finding of probable cause, to which the Minnesota court responded that the "argument fails to recognize . . . that probable cause to support a criminal charge is not the same thing as probable cause to issue a search warrant." 722 N.W.2d at 490. The court explained that "probable cause [for charging purposes] . . . exists when the evidence worthy of consideration brings the charge against the prisoner within reasonable probability." *Id.* (internal citations omitted). On the other hand, probable cause to support a search warrant is found when there is "a fair probability that

---

The Supreme Court upheld the drawing of blood from Schmerber on the narrow special circumstances that waiting for a search warrant would have allowed the alcohol in his system to disappear, thus, an exigent circumstance was pivotal to the Court's reasoning. *Schmerber*, 384 U.S. at 770, 86 S. Ct. at 1835, 16 L. Ed. 2d at 919. Outside of this "emergency" situation, a warrant to invade the body should be obtained "by a neutral and detached magistrate." *Id.*

contraband evidence of a crime will be found in a particular place." *Id.* (internal citation omitted). Conflation of the two standards of probable cause, the *C.T.L.* court concluded, dispenses with the Fourth Amendment requirement that, in order to conduct a search, "law-enforcement personnel must obtain a warrant based on a neutral and detached magistrate's determination that there is a fair probability that the search will produce contraband or evidence of a crime." 722 N.W.2d at 491. Relying on the expungement provision in the Minnesota statute (which allowed those found not guilty ultimately or had charges dropped to have their DNA samples destroyed), the court reasoned that those persons found not guilty had an expectation of privacy greater than the State's need for DNA and, therefore, this interest should be applied reasonably to all persons charged, but not convicted yet. *C.T.L.*, 722 N.W.2d at 491-92. Finally, the *C.T.L.* court concluded that the privacy interest of a person who is charged, but not convicted, is not outweighed by the state's interest in collecting DNA samples. 722 N.W.2d at 492.

In *United States v. Purdy*, No. 8:05CR204, 2005 U.S. Dist. LEXIS 40433, *1 (D. Neb. 2005), a federal district court, against the recommendation of its magistrate judge, granted a defendant's motion to suppress DNA evidence collected under the Nebraska Identifying Personal Characteristics Act ("Nebraska Act"), which allowed law enforcement, without a court

order, to collect DNA samples from arrestees.[29] Purdy was arrested on an outstanding warrant and, at arrest, found to possess a firearm. *Purdy*, 2005 U.S. Dist. LEXIS 40433, at *3. After his arrest, correctional officers collected forcefully DNA samples, causing physical injuries to Purdy that required medical treatment. *Id.* Conceding that the Fourth Amendment does not protect a "characteristic that a person knowingly exposes to the public," like fingerprints or visual likeness, the court distinguished DNA as not exposed to the public and able to reveal medical facts for which individuals have a reasonable expectation of privacy. *Purdy*, 2005 U.S. Dist. LEXIS 40433, at *11. Beginning with the *Katz* premise that a search without a warrant is per se unreasonable, the court concluded that none of the "special needs" exceptions were applicable and used the totality of the circumstances balancing test to evaluate Purdy's challenge. *Purdy*, 2005 U.S. Dist. LEXIS 40433, at *13-15. The Nebraska Act did not provide a constitutional basis for the search of Purdy because the statute would allow warrantless DNA sampling of

---

[29] The Nebraska Act allowed collection of "physical evidence from individuals to aid them in identifying the perpetrators of criminal offenses," including "fingerprints, palm prints, footprints, measurements, handwriting exemplars, lineups, hand printing, voice samples, blood samples, urine samples, saliva samples, hair samples, comparative personal appearance, and photographs." *United States v. Purdy*, No. 8:05CR204, 2005 U.S. Dist. LEXIS 40433, *3-4 (D. Neb. 2005).

anyone arrested, "without the showing of any nexus between the alleged crime and the information that a DNA test would reveal." *Purdy*, 2005 U.S. Dist. LEXIS 40433, at *21-22. Comparing the expectation of privacy and the government interest in convicts, parolees, and probationers to that of arrestees, the court resolved that an arrestee's expectation of privacy outweighs the government desire for warrantless searches. *Purdy*, 2005 U.S. Dist. LEXIS 40433, at *20-21. Because probable cause for arrest is not the same as required for a search, "[a] person arrested, but not convicted, for a certain crime cannot be forced to provide DNA "identification" evidence without a showing that such evidence would identify him as the perpetrator of the crime." *Purdy*, 2005 U.S. Dist. LEXIS 40433, at *22. The court noted also that its holding did not prevent all arrestees from being subjected to DNA sampling; rather, law enforcement officers would need to obtain a search warrant from a "neutral and detached judicial officer." *Purdy*, 2005 U.S. Dist. LEXIS 40433, at *23.

A fractured, three-judge panel of the Arizona intermediate appellate court upheld an Arizona statute allowing a judge to condition pre-trial release upon collection of a DNA sample. *Mario W. v. Kaipio*, 265 P.3d 389 (Ariz. Ct. App. 2011). Five juveniles were charged[30] and an "advisory" court concluded there was

---

[30] Two additional juveniles were arrested, but there was no judicial finding of probable cause as to them. *Mario W. v. Kaipio*, 265 P.3d 389, 392 (Ariz. Ct. App. 2011). Therefore, the court concluded the

probable cause for bringing the charges. *Mario W.*, 256 P.3d at 392. Pre-trial release was conditioned on the giving of DNA samples. *Mario W.*, 256 P.3d at 395. The juveniles contended that the Arizona statute violated the United States and Arizona constitutional protections against unreasonable searches and seizures and their rights to privacy. *Id.* Using the totality of the circumstances test, the Court of Appeals of Arizona, Division One, weighed the following factors in balancing the juveniles' privacy rights against the government interest:

> whether there was a judicial finding of probable cause that the juvenile committed the charged offense, the level of intrusion in relation to the other pre-adjudicative procedures, the degree and nature of physical intrusion required by the test, statutes restricting the use of test results, and any evidence in the record regarding improper uses of the results.

Mario W., 265 P.3d at 396. Agreeing with the conclusion in *Pool*, that a finding of probable cause is a "watershed event," the court determined that the five juveniles were distinguishable from the general public in such a way that permitted an exception to the Fourth Amendment's prohibition against warrantless searches. *Id.* Other statutory restrictions placed on pre-trial detainees, including GPS tracking, supported

---

pre-trial condition of DNA collection was unconstitutional as applied to the facts of their cases. *Id.*

the court's conclusion that the juveniles had a reduced expectation of privacy. *Mario W.*, 265 P.3d at 397 (citing Ariz. R. P. Juv. Ct. 23(E)). The government interest served was an "enhanced interest in crime prevention and deterrence," based on the post-arrest finding of probable cause. *Mario W.*, 265 P.3d at 397. The court noted also that the level of physical intrusion of a buccal swab was minimal. *Id.* The government had a strong interest in determining accurately the juvenile's past criminal history in order to set the proper pre-trial release conditions. *Id.* Moreover, taking an arrestee's DNA sample aids the government in solving crimes and expands the DNA database. *Mario W.*, 265 P.3d at 398. The court relied also upon the purpose of identification, agreeing with Mitchell that arrestees do not have a legitimate expectation of privacy in their identity. *Mario W.*, 265 P.3d at 399. A concurring judge wrote separately to advance the fingerprint-to-DNA analogy as the basis for upholding the statute. *Mario W.*, 265 P.3d at 401 (Orozco, J., concurring).

The third judge, in a dissenting opinion, rejected the analogy of DNA-to-fingerprints and, focusing on the arrestees' presumption of innocence, concluded that the State failed to meet its burden to provide justification for abrogating the juveniles' expectation of privacy. *Mario W.*, 265 P.3d at 404 (Norris, J., dissenting). The dissent criticized the majority for misapplying the totality of the circumstances test when it concluded that the juveniles had "little if any expectation of privacy in their DNA because they have been arrested and a court has found probable cause to hold them for trial." *Mario W.*, 265 P.3d at 405

(Norris, J., dissenting). Rather, argued the dissent, under Supreme Court jurisprudence, the *conviction* is what alters meaningfully the expectation of privacy, not the mere charging. *Mario W.*, 265 P.3d at 405 (Norris, J., dissenting) (citing *Knights*, 534 U.S. at 118, 122 S. Ct. at 591, 151 L. Ed. 2d at 504) (emphasis added). Criticizing also the majority's likening of DNA sampling to other pre-trial release conditions, Judge Norris maintained, as the better reasoned approach, that DNA sampling under prevailing collection techniques is distinguishable because it is a physical intrusion into the body and the juveniles' privacy was further invaded when the DNA sample is analyzed and the profile extracted. *Mario W.*, 265 P.3d at 406 (Norris, J., dissenting).

Rejecting the fingerprint/DNA analogy, Judge Norris noted that a "fingerprint is an impression left by the depositing of oil upon contact between a surface and the fission ridges of the fingers," while DNA "stores massive amounts of personal, private data about an individual." *Mario W.*, 265 P.3d at 407 (Norris, J., dissenting) (quoting *Mitchell*, 365 F.3d at 221; *Kincade*, 379 F.2d at 842 n.3 (Gould, J. concurring)) (internal quotations omitted). The dissent took pains also to protest subsuming DNA sampling into "routine booking practices," countering that fingerprinting became routine prior to the evolution of modern "reasonable expectation of privacy" jurisprudence and "[t]hat today we accept fingerprinting as a routine practice without Fourth Amendment implications does not mean we must accept DNA sampling as being the same." *Mario W.*, 265 P.3d at 407-08 (Norris, J., dissenting).

Finally, Judge Norris criticized the majority's characterization of the statute's purpose as identification only, pointing out that, if that were the case, expungement upon the dismissal of charges would not be necessary. *Mario W.*, 265 P.3d at 408 (Norris, J., dissenting). Noting that the State failed to produce any evidence that there was any difficulty in obtaining accurate identification of any of the juveniles, which might require another method of identification, the dissent argued that "DNA itself provides no identifying information; a DNA sample is only useful when it can be compared to a prior DNA sample obtained from the same person . . . [i]f the arrestee's DNA is not in a DNA database, there can be no comparison and thus no verification of identity." *Id.* The dissent closed with its concern that the majority opinion will "contribute to the downward ratchet of privacy expectations," and that "[a] highly expansive opinion [authorizing a warrantless search], one that draws no hard lines and revels in the boon that new technology will provide to law enforcement, is an engraved invitation to future expansion." *Mario W.*, 265 P.3d at 409 (Norris, J., dissenting) (quoting *Scott*, 450 F.3d at 867; *Kincade*, 379 F.3d at 873 (Kozinski, C.J., dissenting)).

We conclude our survey of relevant opinions with *Anderson v. Commonwealth*, 274 Va. 469, 650 S.E.2d 702, 703 (Va. 2007). The Supreme Court of Virginia upheld, against an as-applied Fourth Amendment challenge, a Virginia statute that authorized DNA collection from individuals upon arrest. *Anderson*, 650 S.E.2d at 703. In 2003, Anderson was arrested for rape and sodomy and his DNA sample was collected

pursuant to Va. Code Ann. § 19.2-310.2:1 (2007). Anderson, 650 S.E.2d at 704. Anderson's DNA profile was uploaded to the DNA databank, resulting in a match to a forensic sample collected from an unsolved 1991 rape. *Id.* Based on the database "hit," detectives obtained a search warrant for an additional DNA buccal swab, the analysis of which provided the primary evidence at Anderson's trial for the 1991 rape as well as the 2003 crimes. *Id.* His motion to suppress the DNA evidence was denied. *Id.* He was convicted of rape, robbery, and sodomy, and sentenced to two life terms, plus ten years. *Id.*

The Virginia Supreme Court concluded that, although a DNA sample is more revealing, it "is no different in character than acquiring fingerprints upon arrest." *Anderson*, 650 S.E.2d at 705. Adopting the fingerprint-to-DNA analogy advanced in *Nicholas*, *Sczubelek*, and this Court's decision in *Raines*, the Virginia court concluded that DNA collection is acceptable as part of the routine booking process as a way of obtaining an arrestee's identification. *Anderson*, 650 S.E.2d at 705-06. In doing so, the court rejected Anderson's reliance on *City of Indianapolis v. Edmond*, 531 U.S. 32, 47, 121 S. Ct. 447, 457, 148 L. Ed. 2d 333, 347 (2000), standing for the proposition that general crime control purposes can "only be justified by some quantum of individualized suspicion," and *Ferguson v. City of Charleston*, 532 U.S. 67, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001), stating that general law enforcement searches are not exempt from the requirements of probable cause. Anderson, 650 S.E.2d at 706. The Virginia court relied upon the reasoning in *Jones v. Murray*, 962 F.2d 302, 306 (4th

Cir. 1992), which considered only application of the Virginia DNA collection statute to convicted felons, but extended the rationale to routine booking procedures, and as such, "no additional finding of individualized suspicion, much less probable cause, must be established before the sample may be obtained." *Anderson*, 650 S.E.2d at 706.

D. The Present Case

We consider first whether King's constitutional challenge to the Maryland DNA Collection Act is as-applied, facially, or both. It is generally preferable for a court to analyze whether a statute is constitutional under the more narrow as-applied standard first, as a matter of judicial efficiency rather than analyzing the broader facial challenge first. *Bd. of Trs. v. Fox*, 492 U.S. 469, 484-85, 109 S. Ct. 3028, 3037, 106 L. Ed. 2d 388, 407 (1989) (noting that "for reasons relating to both the proper functioning of courts and to their efficiency, the lawfulness of the particular application of the law should ordinarily be decided first").[31] It is clear in the present case that King mounts both facial and as-applied Fourth Amendment challenges.

---

[31] Analyzing the as-applied challenge first is, apparently, not a hard and fast rule. *See Marcavage*, *supra*, which analyzed the facial challenge first because of the "significantly heavier" burden required for facial challenges and anticipating a speedy resolution of this prong of the constitutional challenge. 609 F.3d at 273.

Under Maryland common law, there is a strong presumption that statutes are constitutional. *Koshko v. Haining*, 398 Md. 404, 426, 921 A.2d 171, 183 (2007) (citing, among other cases, *Ayres v. Townsend*, 324 Md. 666, 675, 598 A.2d 470, 475 (1991)). To succeed in an as-applied constitutional challenge, King must show that "under [these] particular circumstances [he was] deprived . . . of a constitutional right." *Mitchell*, 652 F.3d at 406 (quoting *Marcavage*, 609 F.3d at 273).

To evaluate King's as-applied challenge, we analyze the totality of the circumstances, using the *Knights* balancing test that weighs King's expectation of privacy on one hand and the state's interests on the other, keeping in mind that the "touchstone" of Fourth Amendment analysis is reasonableness. Our analysis is influenced also by the precept that the government must overcome a presumption that warrantless, suspicionless searches are per se unreasonable. As other courts have concluded, we look at any DNA collection effort as two discrete and separate searches. The first search is the actual swab of the inside of King's mouth and the second is the analysis of the DNA sample thus obtained, a step required to produce the DNA profile. Although some courts follow *Mitchell* in assessing the buccal swab technique as a quick and painless intrusion, we shall not ignore altogether the gravity of a warrantless search and collection of biological material from a mere arrestee. The State bears the burden of overcoming the arrestee's presumption of innocence and his expectation to be free from biological searches before he is convicted of a qualifying crime. As we held in *Raines*, once a person has been adjudicated lawfully to be a felon, his or her

expectation of privacy is "severely reduced" and the State's interest prevails in monitoring, identifying, reintegrating, and preventing recidivism by the felon. Here, however, the expectation of privacy of an arrestee renders the government's purported interests in DNA collection reduced greatly. If application of the balancing test results in a close call when considering convicted felons, as our deeply divided decision in *Raines* suggests, then the balance must tip surely in favor of our closely-held belief in the presumption of innocence here. King's expectation of privacy is greater than that of a convicted felon, parolee, or probationer, and the State's interests are more attenuated reciprocally.

i. King's Expectation of Privacy

King must have a personal, subjective expectation of privacy in order for Fourth Amendment protections to apply. *See Katz*, 389 U.S. at 361, 88 S. Ct. at 516, 19 L. Ed. 2d at 588. As Judge Wilner's concurring opinion in *Raines* noted, DNA samples contain a "massive amount of deeply personal information." 383 Md. at 50, 857 A.3d at 48. The State advances the syllogism that "all that was obtained through [the] search [of King] was his identity -- in the form of 13 pairs of numbers"; there is no right to anonymity; and, thus, the evidence presented at trial is not suppressible. This argument ignores plainly the implications of the search that took place.

That the Maryland DNA Collection Act restricts the use of the biological material obtained does not change the nature of the search. As Judge Rendell noted in

her dissenting opinion in *Mitchell*, upholding the statute simply because of restrictions on use of the material obtained would be analogous to allowing the government to seize private medical records without a warrant, but restrict their use only to the portion of the records that serve to identify the patient. This analogy addresses the State's stance of denying the importance or relevance of the initial physical intrusion and the later processing of King's genetic materials. King, as an arrestee, had an expectation of privacy to be free from warrantless searches of his biological material and all of the information contained within that material.

We do not embrace wholly the analogy between fingerprints and DNA samples advanced in Judge Raker's concurring opinion in *Raines* and by the State in the present case. As aptly noted, fingerprints are a physical set of ridges on the skin of a person's fingers that, when exposed to ink (or other medium) and the resultant imprint placed on paper or electronic records, can determine usually and accurately a person's identity by matching the physical characteristics to a known set of fingerprints. DNA, on the other hand, is contained within our cells and is collected by swabbing the interior of a cheek (or blood draw or otherwise obtained biological material). While the physical intrusion of a buccal swab is deemed minimal, it remains distinct from a fingerprint. We must consider that "[t]he importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great." *Schmerber*, 384 U.S. at 770, 86 S. Ct. at 1835, 16 L. Ed. 2d at 919.

The information derived from a fingerprint is related only to physical characteristics and can be used to identify a person, but no more. A DNA sample, obtained through a buccal swab, contains within it unarguably much more than a person's identity. Although the Maryland DNA Collection Act restricts the DNA profile to identifying information only, we can not turn a blind eye to the vast genetic treasure map that remains in the DNA sample retained by the State. As Judge Wilner noted in his concurring opinion in *Raines*,

> A person's entire genetic makeup and history is forcibly seized and maintained in a government file, subject only to the law's direction that it not be improperly used and the prospect of a misdemeanor conviction if a custodian *willfully* discloses it in an unauthorized manner. No sanction is provided for if the information is non-willfully disclosed in an unauthorized manner, though the harm is essentially the same.

383 Md. at 50, 857 A.2d at 49. In *Raines*, the State's interest regarding DNA collection from convicted felons overwhelmed these considerations. We do not revisit or question that result. Convicted felons are not at issue here. The greater expectation of privacy of an arrestee and the lesser legitimate interest of the State bring concerns about the privacy of genetic material to a different dynamic in the application of the balancing test. Courts that have upheld DNA

collection from arrestees have done so by relying on the fingerprint-to-DNA analogy and a belief that DNA collection has become just another routine booking procedure. While it may be elementary that arrestees undergo photographic and fingerprinting collection, neither of these techniques has undergone definitive Fourth Amendment scrutiny. Even were the fingerprint-to-DNA analogy less tenuous, as described *supra*, we should not be so quick to heap additional exceptions onto a constitutional principle, without a clearer, judicially-proven foundation.

The State underestimates, in seeking to apply conclusively our holding in Raines to the present case, the power of a conviction. Raines's conviction was critical to our analysis there, that convicted felons have a "severely reduced expectation of privacy"; the difference regarding a mere arrestee is critical here. Although arrestees do not have all the expectations of privacy enjoyed by the general public, the presumption of innocence bestows on them greater protections than convicted felons, parolees, or probationers. A judicial determination of criminality, conducted properly, changes drastically an individual's reasonable expectation of privacy. The expungement provisions of the Act recognize the importance of a conviction in altering the scope and reasonableness of the expectation of privacy. If an individual is not convicted of a qualifying crime or if the original charges are dropped, the DNA sample and DNA profile are destroyed. The General Assembly recognized the full scope of the information collected by DNA sampling and the rights of persons not convicted of qualifying crimes to keep this information private. This right

should not be abrogated by the mere charging with a criminal offense: the arrestee's presumption of innocence remains.

The percentage of individuals charged with felonies that are convicted eventually is persuasive. According to data collected by the FBI in 2004, between 16 and 71 percent of individuals charged with a felony are convicted eventually (including guilty pleas), depending on the crime.[32] Bureau of Justice Statistics, U.S. Dept. of Justice, *Sourcebook of Criminal Justice Statistics*, tbl. 5.0002.2004 (Kathleen Maguire ed.), available at http://www.albany.edu/sourcebook/pdf/t500022004.pdf (last visited 20 Apr. 2012). The reasons for this disparity between arrests and convictions are not always apparent, but they illustrate the potential amount of DNA samples that would be collected and processed without a finding of guilt.

We agree with the Minnesota Court of Appeals in *C.T.L.* that "establishing probable cause to arrest a person is not, by itself, sufficient to permit a biological

---

[32] The rates of conviction per 100 arrests for various crimes were: 16 for motor vehicle thefts, 25 for aggravated assault, 44 for burglary, 46 for robbery, 56 for rape, 68 for murder, and 71 for drug trafficking. Bureau of Justice Statistics, U.S. Dept. of Justice, *Sourcebook of Criminal Justice Statistics*, tbl. 5.0002.2004 (Kathleen Maguire ed.), available at http://www.albany.edu/sourcebook/pdf/t500022004.pdf (last visited 20 Apr. 2012).

specimen to be taken from the person without first obtaining a search warrant." 722 N.W.2d at 490. A finding of probable cause for arrest on a crime of violence under the Maryland DNA Collection Act cannot serve as the probable cause for a DNA search of an arrestee.

ii. Government Interest

This Court accepted the State's argument in *Raines* that the purpose of the Maryland DNA Collection Act is to identify individuals, rather than to collect evidence.[33] While that may be true in the context of maintaining a record of inmates, felons, parolees, or probationers (as was the case regarding the scope of the Act at the time *Raines* was decided), in the present case, identification is not what King's DNA sample was used for or needed, and, in most circumstances, will likely not be the case with other arrestees. Solving cold cases, in the State's view, is an ancillary benefit of determining the proper identification of an individual, but for King it was the only State interest served by the collection of his DNA. The State here can not claim the same public safety interests present in cases addressing convicted felons, parolees, or probationers.

---

[33] We note in the present case, as we did in *Raines*, that the express purposes of the statute are to analyze genetic material to assist in an official investigation of a crime, to identify human remains, to identify missing individuals, or for research and administrative purposes. Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-505.

There is no interest in prison safety or administration present. Although we have recognized (and no one can reasonably deny) that solving cold cases is a legitimate government interest, a warrantless, suspicionless search can not be upheld by a "generalized interest" in solving crimes.

Courts upholding statutes authorizing DNA collection from arrestees rely on an expansive definition of "identification" to sweep-up "cold case" crime-solving as a government purpose recognized and approved previously by courts in other contexts. This expanded definition of identity encompasses the traditional name, date of birth, address, and physical characteristics, but also "what that person has done," including his/her past known criminal record and as-yet-unsolved crimes. *See Haskell*, 677 F. Supp. 2d at 1199. Although the State does not advance directly this argument here, it is implicated by the State's heavy reliance on forms of "identification" (or evidence, as the case may be) that may have been collected from previous crimes and compared to the "identification" of an arrestee. Such an argument stretches the bounds of reasonableness under our view of proper Fourth Amendment analysis. We decline to accept it in light of its impacts on an arrestee's expectations of privacy in his or her genetic material, unless that material is deemed properly abandoned.

The State argues that it has a legitimate purpose in identifying accurately arrestees. Accepting this argument *arguendo*, the State presented no evidence that it had any problems whatsoever identifying accurately King through traditional booking routines.

King had been arrested previously, given earlier fingerprint samples, and been photographed. There is no claim that King presented false identification when arrested or had altered his fingerprints or appearance in any way that might increase the State's legitimate interest in requiring an additional form of identification to be certain who it had arrested. The FBI's fingerprint database is a reliable method for law enforcement to identify (or confirm the identities of) arrestees promptly and accurately. When an arrestee's fingerprints are uploaded to the database, the results (which include a photograph, fingerprints, and a criminal history) are returned within minutes. This system contains not only criminal records, but also fingerprints uploaded voluntarily by citizens. This database is essential to law enforcement during routine booking of arrestees. On the other hand, the FBI's DNA database contains no personal identifying information, no names, no birth dates, no social security numbers, and no criminal histories. A "hit" may take months to return. The DNA sample is not analyzed until after the first scheduled arraignment date. The profile must be uploaded and the database searched. The laboratory must return the DNA profile. When a "hit" arises, a law enforcement officer is notified, who must request the additional information.

King was arrested on 10 April 2009. The "hit" was returned on 4 August 2009. At this point, King had been identified accurately via other methods. There is no evidence that the DNA "hit" bolstered or clarified his already confirmed identity.

The State's purported interests are made less reasonable by the fact that DNA collection can wait until a person has been convicted, thus avoiding all of the threats to privacy discussed in this opinion. DNA profiles do not change over time (as far as science "knows" at present), so there is no reasonable argument that unsolved past or future crimes will go unresolved necessarily. We simply will not allow warrantless, suspicionless searches of biological materials without a showing that accurate identification was not possible using "traditional" methods.

In cases where DNA is required for conviction, there will be likely substantial other evidence to provide probable cause for a search warrant. Unfortunately, that does not seem likely in the present case. As regards King's 2009 assault charge that gave rise to collection of his initial compelled DNA sample, the State proceeded to *nolle prosequi* all of the qualifying crimes. King was convicted only of second-degree assault, which is not a qualifying crime under § 2-504.[34]

As regards to King's facial challenge to the Act, a party challenging facially the constitutionality of a

---

[34] Because of the combination of the State's choice to nol pros these charges and the compulsion, on remand of the present case, that King's motion to suppress be granted, King can be tried on the qualifying charges and it is unlikely that a new DNA sample may be obtained under the Act.

statute "must establish that no set of circumstances exist under which the Act would be valid." *Koshko*, 398 Md. at 426, 921 A.2d at 184 (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100, 95 L. Ed. 2d 697, 707 (1987)). In *Salerno*, the Supreme Court set out, in dictum, the "no set of circumstances" test that is used broadly to decide facial constitutional challenges; however, the over-arching distinction between facial and as-applied challenges, in the wake of Salerno, has been less than clear. *See, e.g.*, Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 Wm. & Mary Bill Rts. J. 657, 658 (2010). The Supreme Court, post-Salerno, has not applied consistently the "no set of circumstances" test to facial challenges. *See City of Chicago v. Morales*, 527 U.S. 41, 55, n.22, 119 S. Ct. 1849, 1858, n.22, 144 L. Ed. 2d 67, 79, n.22 (1999) ("To the extent we have consistently articulated a clear standard for facial challenges, it is not the Salerno formulation, which has never been the decisive factor in any decision of this Court . . ."); *Chandler v. Miller*, 520 U.S. 305, 318, 117 S. Ct. 1295, 1303, 137 L. Ed. 2d 513, 526 (1997) (sustaining a facial attack on a Georgia statute requiring drug tests for political candidates, without mentioning the Salerno standard); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202, 128 S. Ct. 1610, 1623, 170 L. Ed. 2d 574, 590-91 (2008) (concluding that "a facial challenge must fail where the statute has a plainly legitimate sweep") (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, 128 S. Ct. 1184, 1190, 170 L. Ed 2d 151, 160 (2008) (internal quotations omitted)). Despite the unclear application of Salerno among the federal courts, we apply the test here according to *Koshko*. We

conclude that King's facial challenge to the statute fails because there are conceivable, albeit somewhat unlikely, scenarios where an arrestee may have altered his or her fingerprints or facial features (making difficult or doubtful identification through comparison to earlier fingerprints or photographs on record) and the State may secure the use of DNA samples, without a warrant under the Act, as a means to identify an arrestee, but not for investigatory purposes, in any event.[35]

The State posits that because King's DNA swab obtained only evidence of his identity the evidence is not suppressible. This argument runs counter to the Supreme Court's holdings in *Hayes*, 470 U.S. at 817, 105 S. Ct. at 1647, 84 L. Ed. 2d at 711, and Davis, 394 U.S. at 727, 89 S. Ct. at 1398, 22 L. Ed. 2d at 681, which concluded that fingerprints obtained illegally were suppressible under the Fourth Amendment. King's identity was not the evidence that served as probable cause for his grand jury rape indictment. A driver's license, fingerprint, photograph, or social security card, all accepted generally as forms of identification, could not have stood in the place of King's DNA sample before the grand jury. What was presented to the grand jury was a match between biological evidence collected from King's 2009 buccal

---

[35] The possible scenarios where law enforcement may require DNA samples to identify an arrestee bring to mind the 1997 film *Face/Off* where a hypothetical face transplant was used to change identities.

swab and the evidence collected during a sexual assault forensic exam from the 2003 rape victim. This biological match is not analogous to a person's name or address, which the Court of Special Appeals held not to be suppressible in *Gibson v. State*, 138 Md. App. 399, 414, 771 A.2d 536, 545 (2001). Assuming *arguendo* that fingerprints and DNA present an apt analogy, they are both suppressible evidence when obtained illegally.

As we conclude that the Maryland DNA Collection Act, as applied to King as an arrestee, was unconstitutional, and King's 10 April 2009 DNA sample was obtained illegally, we must conclude that the second DNA sample, obtained on 18 November 2009, pursuant to a court order based on probable cause gained solely from the "hit" from the first compelled DNA sample, is suppressible also as a "fruit of the poisonous tree." The "fruit of the poisonous tree" doctrine excludes evidence obtained in violation of the Fourth Amendment. *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 417, 9 L. Ed. 2d 441, 456 (1963); *Myers v. State*, 395 Md. 261, 291, 909 A.2d 1048, 1066 (2006). Under the "fruit of the poisonous tree" doctrine, the defendant bears the burden of showing 1) primary illegality and 2) "the cause and effect relationship between the primary illegality and the evidence in issue, to wit, that the evidence was, indeed, the identifiable fruit of that particular tree." *Cox v. State*, 421 Md. 630, 651-52, 28 A.3d 687, 699 (2011) (citing *Gibson*, 138 Md. App. at 404, 771 A.2d at 539). Here, we have determined that the original DNA collection was illegal. The cause-and-effect relationship between King's original buccal swab and

the court-ordered second buccal swab is not attenuated in any way. The first buccal swab provided the sole probable cause for King's first-degree rape grand jury indictment. There was no other evidence linking King to the 2003 unsolved rape. Were it not for the buccal swab obtained illegally after King's assault arrest, there would be no second DNA sample which could have been used as evidence in King's trial for the charges enumerated in footnote seven, *supra*. The DNA evidence presented at trial was a fruit of the poisonous tree.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY REVERSED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE STATE.

IN THE COURT OF APPEALS

OF MARYLAND

No. 68

September Term, 2011

ALONZO JAY KING, JR.

v.

STATE OF MARYLAND

Bell, C.J.,
Harrell
Greene
Adkins
Barbera
Wilner, Alan M. (Retired,
Specially Assigned)
Cathell, Dale R. (Retired,
Specially Assigned),

JJ.

Opinion by Harrell, J.
Barbera and Wilner, JJ., dissent.

Filed: April 24, 2012

I dissent. The Court decides today that the police violated King's Fourth Amendment right to be free from unreasonable searches, when the police, after arresting King based on probable cause that he had committed a violent crime, took a DNA sample via a buccal swab, pursuant to the Maryland DNA Collection Act, Maryland Code (2003, 2011 Repl. Vol.), § 2-504(a)(3) of the Public Safety Article (Act). The majority arrives at this decision by overinflating an arrestee's interest in privacy and underestimating the State's interest in collecting arrestee DNA, and in doing so, plays fast and loose with the well-recognized test for determining the constitutionality of warrantless searches.

It is not disputed--indeed there is no doubt--that the buccal swab was a "search," for purposes of the Fourth Amendment.[1] *See Skinner v. Ry. Labor Executives Ass'n*, 489 U.S. 602, 616, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989). The question, then, is whether this warrantless search complied with the strictures of the Fourth Amendment, the touchstone for which is "reasonableness." *United States v. Knights*, 534 U.S. 112, 118, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001); *accord Wilson v. State*, 409 Md. 415, 427, 975 A.2d 877, 884 (2009). The test for ascertaining the answer to the reasonableness inquiry

---

[1] It also is undisputed that law enforcement officials in the present case followed every one of the statutory and regulatory mandates of the Act when testing King's DNA sample and making use of its results.

is one adopted by the Supreme Court long ago, *Terry v. Ohio*, 392 U.S. 1, 20-21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), and followed by this Court ever since, see *Anderson v. State*, 282 Md. 701, 704-05, 387 A.2d 281, 283 (1978); *Wilson*, 409 Md. at 427, 975 A.2d at 884.

Under that test, whether a given warrantless search is reasonable requires balancing the privacy interests of the individual searched against the legitimate government interests promoted by the search. *Samson v. California*, 547 U.S. 843, 848, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (2006); *accord Wilson*, 409 Md. at 427, 975 A.2d at 884. The test has been employed to uphold searches of persons in situations akin to the case at bar. *See, e.g., Samson*, 547 U.S. at 847 (holding that a police officer's warrantless, suspicionless search of a parolee was reasonable under the Fourth Amendment); *State v. Raines*, 383 Md. 1, 41, 857 A.2d 19, 43 (2004) (holding that the warrantless collection of DNA from "a certain group of convicted persons" was reasonable because "the minimal physical intrusion on the inmate, a person with a diminished expectation of privacy, is outweighed by the legitimate governmental interest in identifying persons involved with crimes, including vindicating those falsely convicted"); *see also Knights*, 534 U.S. at 122 (holding that balancing of the competing interests at stake rendered reasonable the warrantless search, supported by reasonable suspicion, of a probationer's home).

The majority recognizes that the balancing test is the appropriate test to determine the reasonableness, and hence the constitutionality, of the search at issue

here. ____ Md. ____, A.3d ____ (slip op. at 10-11). Regrettably, both for the present case and all other future cases like it, the majority's application of the test to the circumstances here could not be more wrong. Proper analysis of the competing privacy and governmental interests at stake exposes the error.

To repeat, "reasonableness" depends on a balance between the governmental interests and the individual's right to personal security free from arbitrary interference by law officers. In assessing, first, the interests at stake for King, I bear in mind that consideration of the privacy interest implicated by the buccal swab involves identifying both the nature of the privacy interest enjoyed by King at the time of the swab and the character of the intrusion itself. *See Bell v. Wolfish*, 441 U.S. 520, 559, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) ("In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted."). The majority misstates the degree to which King's privacy was impinged by his arrest. The majority juxtaposes King's status as an arrestee with that of a convicted felon, probationer, or parolee, and then declares that King's privacy interest is "greater" than that of persons in those categories because he enjoys a presumption of innocence. ____ Md. at ____, A.3d at ____ (slip op. at 50-51). Certainly, up to the moment of conviction, King enjoyed the presumption of innocence in connection with the crimes charged. Yet King's status as a presumed-innocent man has little to do

with the reduced expectation of privacy attendant to his arrest, processing, and pre-trial incarceration (even if for but a short time). For purposes of the Fourth Amendment analysis, King's privacy expectation at the time of the cheek swab was far more like a convicted felon, probationer, and parolee than an uncharged individual. To make the point, I need mention only some of the intrusions on personal privacy that attend any arrest.

The lawful intrusions that could be, and likely were, visited upon King began at or soon after the moment of arrest. Any arrestee is lawfully subject to an immediate, head-to-toe search of his person and any personal belongings in his possession at the time. *See United States v. Robinson*, 414 U.S. 218, 235, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973). At the station-house, the arrestee can be subjected as a matter of protocol (and without the need for individualized suspicion) to a warrantless strip-search, even if the arrest is for a minor offense. *Florence v. Cnty. of Burlington*, 566 U.S. ____, 132 S. Ct. 1510, ____, 2012 U.S. LEXIS 2712, *36, slip op. at 19 (Filed April 2, 2012). *See also Bell*, 441 U.S. at 558 (approving body cavity searches of pre-trial detainees). Even if not strip-searched, the arrestee can be subject to observation, while in various stages of undress, by police officials; and the arrestee, if placed in a cell with or near other arrestees, can be subject to similar observation by them (or police officials) while using the toilet. *See Johnson v. Phelan*, 69 F.3d 144, 145, 150 (7th Cir. 1995). In short, any arrestee, including King, has a grossly diminished privacy expectation.

The majority's Fourth Amendment analysis also suffers from its mislabeling the character of the intrusion upon privacy and bodily integrity occasioned by the cheek swab, and the degree to which the arrestee's privacy interest is impinged as a result of the information obtained thereby. DNA collection in Maryland is achieved by rubbing and rotating a cotton swab on the inside of an individual's cheeks. This procedure involves placing a cotton instrument inside the mouth for a few seconds, and contacting the cheek with enough pressure to remove a biological sample. The buccal swab technique has been described as "perhaps the least intrusive of all seizures," Jules Epstein, *"Genetic Surveillance"-- The Bogeyman Response to Familial DNA Investigations*, 2009 U. Ill. J.L. Tech & Pol'y 141, 152 (2009) (hereafter "Epstein"), and a "relatively noninvasive means of obtaining DNA" that "pose[s] lowered risk for both the subject and laboratory personnel," Amy H. Walker, et al., *Collection of Genomic DNA by Buccal Swabs for Polymerase Chain Reaction-Based Biomarker Assays*, 107 Envtl. Health Perspective 517, 520 (1999).

A buccal swab is less physically invasive than the drawing of blood, which the Supreme Court addressed in *Schmerber v. California*, 384 U.S. 757, 771-72, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). The Court held in that case that the warrantless drawing of a blood sample from an arrestee, at the direction of a police officer, did not violate the Fourth Amendment prohibition against unreasonable searches. The Court described the drawing of blood as "commonplace" and "involv[ing] virtually no risk, trauma, or pain." *Id.* at 771. Since then, the Supreme Court has characterized

the intrusiveness of blood-drawing as "not . . . an unduly extensive imposition on an individual's personal privacy and bodily integrity," *Winston v. Lee*, 470 U.S. 753, 762, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985); and "not significant," *Skinner*, 489 U.S. at 625. If the subcutaneous removal of blood from a person's veins presents only a marginal intrusion into that person's privacy interest, a fortiori the insertion of a cotton swab into a person's mouth is less of an intrusion and fairly characterized as *de minimis*. Unlike the process of drawing blood, performing a buccal swab does not require skin to be pierced, or a hard, foreign object to be situated inside of the body.

In short, I agree with the reasoning of the United States Court of Appeals for the Ninth Circuit in *Haskell v. Harris*, 669 F.3d 1049, 1059 (9th Cir. 2012). The court in *Haskell* upheld a DNA collection statute that permits buccal swabs of all adults arrested for felonies explaining that,

> the physical extraction of DNA using a buccal swab collection technique is little more than a minor inconvenience to felony arrestees, who have diminished expectations of privacy. Moreover, it is substantially less intrusive, both physically and emotionally, than many of the other types of approved intrusions that are routinely visited upon arrestees.

accord United States v. Mitchell, 652 F.3d 387, 407 (3rd Cir. 2011) (noting, in a case upholding the constitutionality of a federal statute that authorizes

DNA collection from arrestees, that "the intrusion occasioned by the act of collecting the DNA sample is minimal and does not weigh significantly in [the arrestee's] favor").

The amount and character of the information obtained from analysis of the cheek cells is also pertinent to the privacy interest analysis. Here too, the majority's analysis misses the mark. The Act authorizes the collection of biological material that contains an individual's entire genome. The majority seizes on this point, reasoning that "[a] DNA sample . . . contains within unarguably much more than a person's identity[,]" ____ Md. at ____, ____ A.3d at ____ (slip op. at 52), and in that way is unlike a fingerprint, which only "can determine . . . a person's identity by matching the physical characteristics [of the fingerprint] to a known set of fingerprints," *id.* For this reason, notwithstanding that § 2-505(b) of the Act only authorizes DNA analysis for the purpose of identification, the majority is unable to "turn a blind eye to the vast genetic treasure map that remains in the DNA sample retained by the State." ____ Md at ____, ___ A.3d at ____ (slip op. at 52).

I could not disagree more. I interpret the majority's concerns as much like those expressed by the plaintiffs in *Haskell*, *supra*, which the court described as "evok[ing] images of an oppressive 'Big Brother' cataloging our most intimate traits." 669 F.3d at 1059. I, like the Ninth Circuit, believe that "the reality is far less troubling." *See id.* The Act categorically prohibits the plundering of "the vast genetic treasure map" that is incidentally made available by DNA collection. Up

to five years of imprisonment and/or a fine of up to $5,000, see § 2-512(e) of the Act, awaits anyone who "willfully test[s] a DNA sample for information that does not relate to the identification of individuals as specified in this subtitle," § 2-512(c) of the Act. The same potential punishments await anyone who discloses information from a DNA profile, or discloses genetic information from the collected DNA sample itself. *See* § 2-512(a) of the Act. In short, the Act forecloses, without exception, all avenues by which a genetic pirate can obtain and exploit the "genetic treasure map" contained within a collected DNA sample.

Even more important to the privacy assessment is that the procedure by which DNA samples are tested cannot disclose intimate genetic information. COMAR 29.05.01.09(A) effectively restricts the testing of DNA to the 13 loci specified by the FBI and CODIS. These specific loci are non-coding; "in other words, the genetic material at these locations is not known to determine a human attribute such as height, weight, or susceptibility to a particular disease." *Epstein*, *supra* at 143. We have recognized the non-coding nature of these 13 loci, sometimes referred to as "junk" loci, in *Williamson v. State*, 413 Md. 521, 542-43, 993 A.2d 626, 639 (2010). These 13 loci exist in a "hypervariable region" of the DNA strand. "Outside of the hypervariable regions, the genomes of two randomly chosen individuals exhibit few differences. In contrast, within the hypervariable regions, two randomly chosen individuals will exhibit a number of differences." Julian Adams, *Nuclear and Mitochondrial DNA in the Courtroom*, 13 J.L. & Pol'y 69, 74 (2005). Therefore,

the loci cannot reveal any genetic information about an arrestee, other than that the arrestee is identifiably different from other members of the human race. And in showing that an arrestee's DNA is identifiably different from others' DNA, the loci can potentially show that an arrestee's DNA is identical to strands of DNA collected from an unknown source, i.e. a crime scene. *See Raines*, 383 Md. at 25, 857 A.2d at 33 ("the only information obtained from the DNA linked to the individual pursuant to the Act is the DNA identity of the person being tested.").

Though surely a far more sophisticated and "new" means of identification than fingerprints, DNA analysis, when used solely for purposes of identification is, in the end, no different. Both are limited markers that can reveal only identification information. As Judge Raker aptly pointed out in her concurring opinion in *Raines*:

> DNA type need be no more informative than an ordinary fingerprint . . . . The "profile" of an individual's DNA molecule that is stored in a properly constructed DNA identification database (like the FBI's Combined DNA Index System (CODIS)) is a series of numbers. The numbers have no meaning except as a representation of molecular sequences at DNA loci that are not indicative of an individual's personal traits or propensities. In this sense, the CODIS 13-STR "profile" is very much like a social security number–though it is

> longer and is assigned by chance, not by the federal government.

Id. at 45, 857 A.2d at 45-46 (Raker, J., concurring) (quoting D. Kaye and M. Smith, *DNA Identification Databases, Legality, Legitimacy, and the Case for Population-Wide Coverage*, 2003 Wis. L. Rev. 413, 431-32 (2003)). In this way, the numbers of a DNA profile are identical to the ridges of a fingerprint–the information derived from both is, as the majority concedes, " related only to physical characteristics and can be used to identify a person, but no more." ____ Md. at ____, ____ A.3d at ____ (slip op. at 52).

The Supreme Court has given, albeit impliedly, the constitutional "go ahead" for the fingerprinting procedure. *See Hayes v. Florida*, 470 U.S. 811, 817, 105 S. Ct. 1643, 84 L. Ed. 2d 705 (1985) ("There is thus support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch."). Given the similarity of fingerprinting and the DNA collection authorized by the Act, there is little concern that the Act implicates a weighty privacy interest.

Furthermore, if an arrestee has any interest in the information extracted from collected DNA, it is a privacy interest in the identification information revealed by the 13 loci. Given the already-diminished

expectation an arrestee has in privacy generally, an arrestee can have only a modicum of interest in identity privacy, if any interest at all. *Cf. Raines*, 383 Md. at 25, 857 A.2d at 33 ("As such, appellee and other incarcerated individuals have little, if any, expectation of privacy in their identity.").

On the other side of the Fourth Amendment reasonableness balancing equation is the State's interest in the use and retention of DNA evidence. I need not discuss here the significance of all the government interests at stake, although there are at least three: identifying arrestees, solving past crimes, and exonerating innocent individuals. *See Haskell*, 669 F.3d at 1062-65 (discussing those interests); *Mitchell*, 652 F.3d at 413-15 (same).

We emphasized in *Raines* that identifying perpetrators of crimes is a "compelling governmental interest." 383 Md. at 21, 857 A.2d at 31. In responding to this strong law enforcement interest, the majority eludes faithful application of the case law on the subject of "identity," by carefully circumscribing its meaning. The majority reasons that "identity" includes only an individual's name, age, address, and physical characteristics, but does not include "what [the] person has done." ____ Md. at ____, ____ A.3d at ____ (slip op. at 56). Based on this reasoning, the majority notes that the government can claim no legitimate interest in identifying an individual for the purpose of uncovering past misdeeds. *Id.* From that premise the majority holds that the Act is unconstitutional as applied to King because King's DNA collection was superfluous: the identification

interest already was served by the fingerprinting and photographing of King. ____ Md. at ____, ____ A.3d at ____ (slip op. at 57-58).

On the majority's first point, nothing in the law supports the majority's restrictive definition of identity. In the context of the Fourth Amendment, the Supreme Court has made clear that law enforcement's interest in identity extends to knowing whether a person has been involved in crime. *See Hiibel v. Sixth Judicial Dist. Ct.*, 542 U.S. 177, 186, 124 S. Ct. 2451, 159 L. Ed. 2d 292 (2004) ("Obtaining a suspect's name in the course of a Terry stop serves important government interests. Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder."). The majority's definition raises the rhetorical question: "Why law enforcement would want to know a person's name, if not to know whether that person is linked to crime?"

On the second point, the majority essentially holds that DNA collection cannot displace traditional methods of identification because those traditional methods are less intrusive and in use effectively. ____ Md. at ____, A.3d at ____ (slip op. at 58). The Court of Appeals for the Ninth Circuit in *Haskell* characterized such reasoning as "a Luddite approach" to Fourth Amendment interpretation. 669 F.3d at 1063. "Nothing in the Constitution compels us to . . . prevent the Government from using this new and highly effective tool [of identification] to replace (or supplement) older ones." *Id.* Moreover, the Supreme Court has been clear in "repeatedly refus[ing] to

declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment." *City of Ontario v. Quon*, 130 S. Ct. 2619, 2632, 177 L. Ed. 2d 216 (2010) (quoting *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 663, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995)). Finally, as this Court recognized in *Raines*, "[i]t is not for us to weigh the advantages of one method of identification over another." 383 Md. at 20, 857 A.2d at 30 (quoting *Jones v. Murray*, 962 F.2d 302, 308 (4th Cir. 1992)).

Even assuming that the government's strong interest in identifying perpetrators of crime is the only interest at stake in this case (which it is not), that interest, when balanced against the significantly diminished expectation of privacy attendant to taking a buccal swab of an arrestee, yields, in my view, an obvious answer to the question presented in this case. The swab of King's inner cheek to extract material from which 13 DNA "junk" loci are tested to identify him is a reasonable search, and therefore permitted by the Fourth Amendment. I therefore would affirm the judgment of the Circuit Court for Wicomico County.

Judge Wilner authorizes me to state that he joins the views expressed here.

ALONZO JAY KING, JR.* IN THE

* COURT OF APPEALS

v. * OF MARYLAND

STATE OF MARYLAND * (No. 2118, Sept. Term 2010
Court of Special Appeals)

ORDER

It is this 24th day of October, 2011

ORDERED, by the Court of Appeals of Maryland, on its own motion, that a writ of certiorari to the Court of Special Appeals shall issue in the above entitled case, and said case shall be docketed on the regular docket as No. 68, September Term, 2011; and it is further

ORDERED that this case shall be set for argument during the January session of Court.

/s/ Robert M. Bell
Chief Judge

ALONZO JAY KING, JR. * IN THE

v. * COURT OF APPEALS

STATE OF MARYLAND, * OF MARYLAND

* No. 68

* September Term, 2011

ORDER

The Court having considered the Motion for Reconsideration or, Alternatively, for Stay of Enforcement of the Mandate and the responses filed thereto in the above-captioned case, it is this 18th day of May, 2012,

ORDERED, by the Court of Appeals of Maryland, that the motion for reconsideration be, and it is hereby, DENIED, and it is further

ORDERED that the stay of enforcement of the mandate, a majority of the Court concurring, be, and it is hereby, DENIED.

/s/ Robert M. Bell
Chief Judge

Supreme Court of the United States

No. 12A48

MARYLAND,

Applicant

v.

ALONZO J. KING, JR.

ORDER

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the judgment and mandate of the Court of Appeals of Maryland, case No. 68, is hereby stayed pending receipt of a response, due on or before Wednesday, July 25, 2012, by 4 p.m., and further order of the undersigned or of the Court.

/s/ John G. Roberts, Jr.
Chief Justice of the United States

Dated this 18th
day of July, 2012.

SUPREME COURT OF THE UNITED STATES

No. 12A48

MARYLAND v. ALONZO JAY KING, JR.

ON APPLICATION FOR STAY

[July 30, 2012]

CHIEF JUSTICE ROBERTS, Circuit Justice.

Maryland's DNA Collection Act, Md. Pub. Saf. Code Ann. §2-501 *et seq.* (Lexis 2011), authorizes law enforcement officials to collect DNA samples from individuals charged with but not yet convicted of certain crimes, mainly violent crimes and first-degree burglary. In 2009, police arrested Alonzo Jay King, Jr., for first-degree assault. When personnel at the booking facility collected his DNA, they found it matched DNA evidence from a rape committed in 2003. Relying on the match, the State charged and successfully convicted King of, among other things, first-degree rape. A divided Maryland Court of Appeals overturned King's conviction, holding the collection of his DNA violated the Fourth Amendment because his expectation of privacy outweighed the State's interests. 425 Md. 550, 42 A. 3d 549 (2012). Maryland now applies for a stay of that judgment pending this Court's disposition of its petition for a writ of certiorari.

To warrant that relief, Maryland must demonstrate

(1) "a reasonable probability" that this Court will grant certiorari, (2) "a fair prospect" that the Court will then reverse the decision below, and (3) "a likelihood that irreparable harm [will] result from the denial of a stay." *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (GINSBURG, J., in chambers) (internal quotation marks omitted).

To begin, there is a reasonable probability this Court will grant certiorari. Maryland's decision conflicts with decisions of the U.S. Courts of Appeals for the Third and Ninth Circuits as well as the Virginia Supreme Court, which have upheld statutes similar to Maryland's DNA Collection Act. See *United States v. Mitchell*, 652 F. 3d 387 (CA3 2011), cert. denied, 566 U.S. ___ (2012); *Haskell v. Harris*, 669 F. 3d 1049 (CA9 2012), reh'g en banc granted, 2012 WL 3038593 (July 25, 2012); *Anderson v. Commonwealth*, 274 Va. 469, 650 S.E. 2d 702 (2007), cert. denied, 553 U.S. 1054 (2008); see also *Mario W. v. Kaipio*, 2012 WL 2401343 (Ariz. 2012) (holding that seizure of a juvenile's buccal cells does not violate the Fourth Amendment but that extracting a DNA profile before the juvenile is convicted does).

The split implicates an important feature of day-to-day law enforcement practice in approximately half the States and the Federal Government. Reply to Memorandum in Opposition 3; see 114 Stat. 2728, as amended, 42 .S.C. §14135a(a)(1)(A) (authorizing the Attorney General to "collect DNA samples from individuals who are arrested, facing charges, or convicted"). Indeed, the decision below has direct effects beyond Maryland: Because the DNA samples Maryland collects may otherwise be eligible for the FBI's national DNA database, the decision renders the

database less effective for other States and the Federal Government. These factors make it reasonably probable that the Court will grant certiorari to resolve the split on the question presented. In addition, given the considered analysis of courts on the other side of the split, there is a fair prospect that this Court will reverse the decision below.

Finally, the decision below subjects Maryland to ongoing irreparable harm. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (REHNQUIST, J., in chambers). Here there is, in addition, an ongoing and concrete harm to Maryland's law enforcement and public safety interests. According to Maryland, from 2009—the year Maryland began collecting samples from arrestees—to 2011, "matches from arrestee swabs [from Maryland] have resulted in 58 criminal prosecutions." Application 16. Collecting DNA from individuals arrested for violent felonies provides a valuable tool for investigating unsolved crimes and thereby helping to remove violate offenders from the general population. Crimes for which DNA evidence is implicated tend to be serious, and serious crimes cause serious injuries. That Maryland may not employ a duly-enacted statute to help prevent these injuries constitutes irreparable harm.

King responds that Maryland's eight-week delay in applying for a stay undermines its allegation of irreparable harm. In addition, he points out that of the 10,666 samples Maryland seized last year, only 4,327 of them were eligible for entry into the federal database and only 19 led to an arrest (of which fewer

than half led to a conviction). Memorandum in Opposition 11. These are sound points. Nonetheless, in the absence of a stay, Maryland would be disabled from employing a valuable law enforcement tool for several months—a tool used widely throughout the country and one that has been upheld by two Courts of Appeals and another state high court.

Accordingly, the judgment and mandate below are hereby stayed pending the disposition of the petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court.

It is so ordered.

OPPOSITION BRIEF

RECORD
AND
BRIEFS

No. 12-207

In the Supreme Court of the United States

STATE OF MARYLAND, PETITIONER

v.

ALONZO JAY KING, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL B. DEWOLFE
Public Defender
STEPHEN B. MERCER
Chief Attorney, Forensics Division
OFFICE OF THE PUBLIC DEFENDER
6 Saint Paul Street, Suite 1400
Baltimore, MD 21202

KANNON K. SHANMUGAM
Counsel of Record
JAMES M. MCDONALD
DAVID M. HORNIAK
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

QUESTION PRESENTED

Whether the Fourth Amendment permits the warrantless collection and analysis of DNA from a person who has been arrested for, but not convicted of, a criminal offense, solely for use in investigating other offenses for which there is no individualized suspicion.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 9
A. Petitioner fails to identify a conflict that warrants the Court's review at this time 10
B. This case is a poor vehicle for resolution of any conflict 18
Conclusion 21

TABLE OF AUTHORITIES

Cases:

Anderson v. *Commonwealth*, 650 S.E.2d 702 (Va. 2007), cert. denied, 553 U.S. 1054 (2008) 11, 12, 13
City of Ontario v. *Quon*, 130 S. Ct. 2619 (2010) 9
Haskell v. *Harris*, 669 F.3d 1049 (9th Cir.), reh'g granted, 686 F.3d 1121 (2012) 12, 14, 16, 17
In re Welfare of C.T.L., 722 N.W.2d 484 (Minn. Ct. App. 2006) 12
Mario W. v. *Kaipio*, 281 P.3d 476 (Ariz. 2012) 12
North Carolina v. *Alford*, 400 U.S. 25 (1970) 2
People v. *Buza*, 129 Cal. Rptr. 3d 753 (Ct. App.), cert. granted, 262 P.3d 854 (Cal. 2011) 12, 14
Samson v. *California*, 547 U.S. 843 (2006) 4, 20
United States v. *Amerson*, 483 F.3d 73 (2d Cir.), cert. denied, 552 U.S. 1042 (2007) 20
United States v. *Davis*, 690 F.3d 226 (4th Cir. 2012) 13, 14, 20
United States v. *Fricosu*, 844 F. Supp. 2d 1201 (D. Colo. 2012) 12
United States v. *Knights*, 534 U.S. 112 (2001) 4

Page

Cases—continued:

United States v. *Leon*, 468 U.S. 897 (1984) 14
United States v. *Mitchell*,
652 F.3d 387 (3rd Cir. 2011),
cert. denied, 132 S. Ct. 1741 (2012) ..... *passim*
United States v. *Pool*, 621 F.3d 1213 (9th Cir. 2010),
vacated as moot, 659 F.3d 761 (2011) 12
United States v. *Purdy*, Crim. No. 05-204,
2005 WL 3465721 (D. Neb. Dec. 19, 2005) 12

Constitution and statutes:

U.S. Const. Amend. IV ..... *passim*
28 U.S.C. 1257(a) 1
42 U.S.C. 14135a 10
2008 Md. Laws 337 2
Maryland DNA Collection Act,
Md. Code Ann., Pub. Safety §§ 2-501 to 2-514 2
Md. Code Ann., Pub. Safety § 2-502(d) 3
Md. Code Ann., Pub. Safety § 2-504(a)(3) 2
Md. Code Ann., Pub. Safety § 2-504(b)(1) 2
Md. Code Ann., Pub. Safety § 2-504(d)(1) 3
Md. Code Ann., Pub. Safety § 2-505(a) 2, 3
Md. Code Ann., Pub. Safety § 2-506(a) 3
Md. Code Ann., Pub. Safety § 2-506(b) 3
Md. Code Ann., Pub. Safety § 2-506(d) 16
Md. Code Ann., Pub. Safety § 2-510 3
Md. Code Ann., Pub. Safety § 2-511 3

Miscellaneous:

DNAResource.com, *2011 DNA Database Legislation* (Jan. 21, 2012) <tinyurl.com/dnalegislation> 17
Federal Bureau of Investigation, *CODIS Brochure*
(last visited Oct. 12, 2012)
<tinyurl.com/codisbrochure> 3
Federal Bureau of Investigation, *Familial Searching* (last visited Oct. 12, 2012)
<tinyurl.com/familialdnasearching> 16

Page

Miscellaneous—continued:

Federal Bureau of Investigation, *Planned Process and Timeline for Implementation of Additional CODIS Core Loci* (last visited Oct. 12, 2012) <tinyurl.com/newloci> 16
H.R. Rep. No. 900, 106th Cong., 2d Sess. (2000) 15
Michelle Hibbert, *DNA Databanks: Law Enforcement's Greatest Surveillance Tool?*, 34 Wake Forest L. Rev. 767 (1999) 13
Elizabeth E. Joh, *Reclaiming 'Abandoned' DNA: The Fourth Amendment and Genetic Privacy*, 100 Nw. U. L. Rev. 857 (2006) 15
Gina Kolata, *Bits of Mystery DNA, Far From 'Junk,' Play Crucial Role*, N.Y. Times, Sept. 6, 2012, at A1 15
Julie Samuels et al., *Collecting DNA From Arrestees: Implementation Lessons*, Nat'l Inst. Just. J., June 2012, at 19 ..... 12, 13, 17

In the Supreme Court of the United States

No. 12-207

STATE OF MARYLAND, PETITIONER

v.

ALONZO JAY KING, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Maryland Court of Appeals (Pet. App. 1a-85a) is reported at 42 A.3d 549. The court's order denying reconsideration and a stay of the mandate (Pet. App. 87b) is unreported.

JURISDICTION

The judgment of the Maryland Court of Appeals was entered on April 24, 2012. A motion for reconsideration was denied on May 18, 2012 (Pet. App. 87b). The petition for a writ of certiorari was filed on August 14, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATEMENT

1. On April 10, 2009, respondent was arrested in Wicomico County, Maryland, and charged in state court with first- and second-degree assault. The charge of first-degree assault was later dropped; after respondent entered a plea pursuant to *North Carolina* v. *Alford*, 400 U.S. 25 (1970), he was convicted of second-degree assault, a misdemeanor offense. Pet. App. 4a & n.3.

Upon respondent's arrest, the state collected a sample of his DNA pursuant to the Maryland DNA Collection Act (Act), Md. Code Ann., Pub. Safety §§ 2-501 to 2-514. Although the Act had previously provided for the collection of DNA only from individuals who had been convicted of felonies or burglaries, the Maryland General Assembly temporarily expanded it in 2008 to cover individuals who had been charged with, but not yet convicted of, certain specified offenses—including, as is relevant here, first-degree assault. *Id.* § 2-504(a)(3); 2008 Md. Laws 337. The collection of DNA samples from covered individuals is mandatory; with regard to individuals who have been charged but not convicted, the Act provides that the state is to collect the sample at the time of the charge. Md. Code Ann., Pub. Safety § 2-504(b)(1).

The Act further provides that, "[t]o the extent fiscal resources are available," DNA samples "shall be * * * tested" for several purposes, including "as part of an official investigation into a crime"; "to analyze and type the genetic markers contained in or derived from the [sample]"; and "for research and administrative purposes," such as "develop[ing] a population data base after personal identifying information is removed" and "support[ing] identification research and protocol development of forensic DNA analysis methods." Md. Code Ann., Pub. Safety § 2-505(a). As to individuals who have been charged but not convicted, the Act authorizes the

state to store DNA samples while charges remain pending. *Id.* §§ 2-506(b), 2-511.

As is relevant here, the Act also authorizes the state to prepare and store "DNA records" (also known as DNA profiles), which can be compared with similar profiles in national and state databases. Md. Code Ann., Pub. Safety §§ 2-502(d), 2-504(d)(1), 2-506(a). Those databases contain DNA profiles from forensic evidence collected at crime scenes, as well as profiles of convicted and arrested individuals. See, *e.g.*, Federal Bureau of Investigation, *CODIS Brochure* (last visited Oct. 12, 2012) <tinyurl.com/codisbrochure>.

State personnel collected a sample of respondent's DNA by means of a swab of the inside of his cheek. The Forensic Sciences Division of the Maryland State Police processed respondent's DNA sample; a private vendor then analyzed the sample and prepared a DNA profile. After the DNA profile was uploaded into the state database, it was matched to a profile from forensic evidence of a 2003 sexual assault in Wicomico County. Pet. App. 4a-6a.

2. Based solely on that match, the state sought, and a Wicomico County grand jury returned, an indictment charging respondent with various offenses arising from the sexual assault, including first-degree rape. Because the Act provides that a match "may be used only as probable cause and is not admissible at trial," Md. Code Ann., Pub. Safety § 2-510, the state obtained a search warrant and collected a second DNA sample, which also produced a match. Pet. App. 7a.

Respondent moved to suppress evidence of the DNA match on the ground that the initial collection and analysis of his DNA violated the Fourth Amendment. Pet. App. 7a-8a. The trial court denied respondent's motion, summarily reasoning that "[i]t is well settled that pris-

oners do not enjoy the same Fourth Amendment protections against unconstitutional searches and seizures as the general population." C.A. App. 5. Based on stipulated facts, with respondent preserving his right to appeal on the Fourth Amendment issue, the trial court found respondent guilty of first-degree rape. Pet. App. 10a. The court sentenced him to life imprisonment. *Ibid.*

3. The Maryland Court of Appeals reversed. Pet. App. 1a-85a. It held, by a 5-2 vote, that the warrantless collection and analysis of respondent's DNA pursuant to the Maryland DNA Collection Act violated the Fourth Amendment. *Ibid.*

a. As a preliminary matter, the Maryland Court of Appeals reasoned that, under the Fourth Amendment, "[a] seizure or search will be upheld even if there is a reasonable expectation of privacy when the government has a 'special need.'" Pet. App. 14a. The court noted, however, that the state had "do[ne] little more than mention the special needs exception in the present case." *Ibid.* That was "for good reason," according to the court, because the "narrow confines" of that doctrine "do not embrace the case at bar." *Ibid.*

The court then proceeded to consider whether the collection and analysis of respondent's DNA were reasonable under the "totality of the circumstances" balancing test set forth by this Court in analyzing the Fourth Amendment rights of parolees and probationers. Pet. App. 14-17a (citing *Samson* v. *California*, 547 U.S. 843 (2006), and *United States* v. *Knights*, 534 U.S. 112 (2001)). After a lengthy analysis of the existing case law, the court explained that, under the "totality of the circumstances" balancing test, it was required to "weigh[] [respondent's] expectation of privacy on the one hand and the state's interests on the other, keeping in mind that the 'touchstone' of Fourth Amendment analysis is

reasonableness." *Id.* at 58a. The court added that "[o]ur analysis is influenced * * * by the precept that the government must overcome a presumption that warrantless, suspicionless searches are per se unreasonable." *Ibid.* And the court noted that, because respondent had been charged with, but not convicted of, a crime at the time his DNA was collected and analyzed, "[his] expectation of privacy is greater than that of a convicted felon, parolee, or probationer, and the [s]tate's interests are more attenuated reciprocally." *Id.* at 59a.

First addressing respondent's expectation of privacy, the Maryland Court of Appeals noted that "[respondent], as an arrestee, had an expectation of privacy to be free from warrantless searches of his biological material and all of the information contained within that material." Pet. App. 60a. The court observed that "DNA samples contain a massive amount of deeply personal information." *Id.* at 59a (internal quotation marks and citation omitted). The court then concluded that, to the extent the Act imposed restrictions on the use of the DNA sample, that fact "does not change the nature of the search." *Ibid.* The court explained that "upholding the statute simply because of restrictions on the use of the material would be analogous to allowing the government to seize private medical records without a warrant, but restrict their use only to the portion of the records that serve to identify the patient." *Id.* at 60a.

In a related vein, the court refused to "embrace wholly" the analogy between taking DNA samples and fingerprinting advanced by the state. Pet. App. 60a. At the outset, the court noted that the collection of respondent's DNA involved a physical intrusion, albeit a "minimal" one. *Ibid.* The court then observed that "[t]he information derived from a fingerprint is related only to physical characteristics and can be used to identify a person, but

no more." *Id.* at 61a. By contrast, "[a] DNA sample * * * contains within it unarguably much more than a person's identity." *Ibid.* "Although the [Act] restricts the DNA profile to identifying information only," the court continued, "we cannot turn a blind eye to the vast genetic treasure map that remains in the DNA sample retained by the [s]tate." *Ibid.*

In determining that respondent's expectation of privacy was substantial, the court described the distinction between convicted and arrested individuals as "critical to our analysis." Pet. App. 62a. The court reasoned that, "[a]lthough arrestees do not have all the expectations of privacy enjoyed by the general public, the presumption of innocence bestows on them greater protections than convicted felons, parolees, or probationers." *Ibid.* The court added that the right to privacy implicated by DNA collection and analysis "should not be abrogated by the mere charging with a criminal offense," because "the arrestee's presumption of innocence remains." *Id.* at 62a-63a. And the court noted that the Act itself recognized that distinction, by providing for expungement of the DNA sample and profile where a qualifying charge does not result in a conviction. *Id.* at 62a.

Turning to the state's interests, the Maryland Court of Appeals reasoned that, because respondent had already been "accurately" identified by the time his DNA sample was analyzed several months after his arrest, "the only [s]tate interest served by the collection of his DNA" was "[s]olving cold cases." Pet. App. 64a-65a, 66a. Although the court recognized that interest as a legitimate one, it determined that "a warrantless, suspicionless search cannot be upheld by a 'generalized interest' in solving crimes." *Id.* at 65a. At the same time, the court conceded that its analysis might be different in a case in which the arrestee "presented false identification

when arrested or had altered his fingerprints or appearance in any way that might increase the [s]tate's legitimate interest in requiring an additional form of identification to be certain who it had arrested." *Id.* at 66a.

In analyzing the state's interests, the court emphasized that "DNA collection can wait until a person has been convicted, thus avoiding all of the threats to privacy discussed in this opinion." Pet. App. 67a. The court reasoned that, because "DNA profiles do not change over time (as far as science 'knows' at present)," "there is no reasonable argument that unsolved past or future crimes will go unresolved necessarily." *Ibid.* The court added that, in many cases in which DNA-related evidence is required for conviction, "there will be * * * substantial other evidence to provide probable cause for a search warrant" for that evidence. *Ibid.*

Based on its conclusion that the initial collection and analysis of respondent's DNA were invalid, the Maryland Court of Appeals suppressed the evidence of the subsequent DNA match under the "fruit of the poisonous tree" doctrine. Pet. App. 70a-71a.

b. Judge Barbera, joined by Judge Wilner, dissented. Pet. App. 72a-85a. At the outset, Judge Barbera conceded that the swab of respondent's cheek was a search for Fourth Amendment purposes. *Id.* at 73a. She nevertheless dissented on the ground that the majority had "overinflat[ed] an arrestee's interest in privacy and underestimat[ed] the [s]tate's interest in collecting arrestee DNA." *Ibid.*

In Judge Barbera's view, "[respondent's] privacy expectation at the time of the cheek swab was far more like a convicted felon, probationer, and parolee than an uncharged individual." Pet. App. 76a. Judge Barbera cited the ability of the police to conduct a search incident to arrest and another search incident to admission into the

jail population, *ibid.*; the relatively minimal intrusion from the cheek swab, *id.* at 77a; and the state's self-imposed limitations on the use of information contained in the DNA sample, *id.* at 79a-80a. Relying on those limitations, she concluded that DNA analysis is "in the end[] no different" from fingerprinting, because "the numbers of a DNA profile are identical to the ridges of a fingerprint." *Id.* at 81a-82a.

Judge Barbera then contended that the state had substantial interests in collecting and analyzing respondent's DNA. Pet. App. 83a-85a. She reasoned that "law enforcement's interest in identity extends to knowing whether a person has been involved in crime," *id.* at 84a, and that the state was not required to use the least intrusive means of identification, *id.* at 84a-85a. On that basis, Judge Barbera concluded that the government's interest in "identifying perpetrators of crime" outweighed the "significantly diminished expectation of privacy attendant to taking a [cheek] swab of an arrestee." *Ibid.*

c. The state filed a motion for reconsideration and a stay of the mandate, which was denied without recorded dissent. Pet. App. 87b.

4. The state then filed an application in this Court for a stay of the mandate. The Chief Justice granted the application. Pet. App. 89b-92b. The Chief Justice first determined that there was a reasonable probability of certiorari because the decision below conflicted with decisions of two federal courts of appeals and the Virginia Supreme Court. *Id.* at 90b. While noting that respondent had made "sound points" about the limited impact of the decision below, the Chief Justice ultimately concluded that the state had made the requisite showing of irreparable harm. *Id.* at 91b-92b.

ARGUMENT

This case raises a number of indisputably substantial issues concerning the privacy implications of the government's collection and analysis of DNA—issues that the Court has yet to confront. At the same time, this is the paradigmatic situation in which further percolation is warranted. Only one federal court of appeals and one other state court of last resort have squarely addressed the specific question presented here: namely, whether the Fourth Amendment permits the warrantless collection and analysis of DNA from a person who has been arrested for, but not convicted of, a criminal offense. Cases presenting that question are currently percolating in lower courts across the country. The science and technology behind DNA analysis continue to evolve rapidly, and the legal landscape is also shifting as officials develop new uses of DNA analysis and refine the governing laws in an effort to strike an appropriate balance between law-enforcement and privacy interests. In addition, for numerous statute- and case-specific reasons, this case is a particularly poor vehicle for the Court's review.

As the Court recently cautioned, "[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." *City of Ontario* v. *Quon*, 130 S. Ct. 2619, 2629 (2010). The Court should await further legal and scientific developments before addressing the difficult issues presented by the application of traditional Fourth Amendment principles to the emerging technology of DNA collection and analysis. The petition for a writ of certiorari should be denied.

A. Petitioner Fails To Identify A Conflict That Warrants The Court's Review At This Time

Petitioner only briefly contends (Pet. 8-11) that the Maryland Court of Appeals' decision implicates a conflict among the lower courts. That is for good reason. At best, petitioner identifies a nascent and shallow conflict that the decision below creates with decisions of one federal court of appeals and another state court of last resort. This Court should permit further percolation before intervening to resolve any conflict.

1. a. On the federal level, only the Third Circuit has definitively addressed the constitutionality of the warrantless collection and analysis of DNA from a person who has been arrested for, but not convicted of, a criminal offense. In *United States* v. *Mitchell*, 652 F.3d 387 (2011), cert. denied, 132 S. Ct. 1741 (2012), the en banc Third Circuit upheld, by an 8-6 vote, the collection and analysis of DNA pursuant to the federal DNA statute, 42 U.S.C. 14135a. Like the Maryland Court of Appeals, the Third Circuit applied the "totality of the circumstances" balancing test set forth by this Court in analyzing the Fourth Amendment rights of parolees and probationers. See *Mitchell*, 652 F.3d at 403. The Third Circuit, however, reached a different result in balancing the defendant's expectation of privacy and the state's interests. The court first determined that "arrestees and pretrial detainees have a diminished expectation of privacy in their identity." *Id.* at 413. The court then determined that "DNA collection furthers the [g]overnment's interest in accurately identifying arrestees and pretrial detainees." *Id.* at 414. Based on those determinations, the court concluded that the federal DNA statute was constitutional, both facially and as applied to the particular defendant. *Id.* at 415-416.

Notably, the Third Circuit relied on the government's policy of "using only 'junk DNA' in creating the DNA profile, which does not contain any individual genetic information." 652 F.3d at 408. The court reasoned that, "[s]hould technological advancements change the value of 'junk DNA,' reconsideration of our Fourth Amendment analysis may be appropriate." *Ibid.*

Judge Rendell, joined by Chief Judge McKee and Judges Barry, Greenaway, Vanaskie, and Ambro, dissented in relevant part. She contended that "the majority g[a]ve[] short shrift to an arrestee's and pretrial detainee's expectation of privacy in his DNA * * * and overstate[d] the significance of the [g]overment's interest in collecting evidence to solve crimes." 652 F.3d at 416. And she asserted that "the searches and seizure of one's DNA permitted by [the federal DNA statute] implicate privacy interests far more expansive than mere identity." *Ibid.* Judge Rendell concluded that the "blanket mandate" of the federal statute "contradict[ed] basic and essential Fourth Amendment principles." *Id.* at 431.

On the state level, the only other court of last resort to have squarely considered the constitutionality of the warrantless collection and analysis of an arrestee's DNA is the Virginia Supreme Court. That court upheld the collection and analysis of DNA from an arrestee, but on different grounds from those later invoked by the Third Circuit. See *Anderson* v. *Commonwealth*, 650 S.E.2d 702 (Va. 2007), cert. denied, 553 U.S. 1054 (2008). Rather than engaging in "totality of the circumstances" balancing, the Virginia Supreme Court relied entirely on the analogy between the taking of DNA samples and fingerprinting. *Id.* at 705. Specifically, the court reasoned that "[a] DNA sample of the accused taken upon arrest, while more revealing, is no different in character than acquiring fingerprints upon arrest." *Ibid.* Because "[f]inger-

printing an arrested suspect has long been considered a part of the routine booking process," the court concluded, "the taking of a DNA sample * * * is permissible as a part of routine booking procedures." *Id.* at 706.

In granting petitioner's application for a stay in this case, the Chief Justice also cited the decision of a panel of the Ninth Circuit in *Haskell* v. *Harris*, 669 F.3d 1049 (2012). See Pet. App. 90b. After petitioner filed its stay application, however, the Ninth Circuit granted rehearing en banc in *Haskell*, rendering the panel's decision non-precedential. See 686 F.3d 1121 (2012). As matters currently stand, therefore, the Maryland Court of Appeals' decision at most creates a 2-1 conflict on the specific question presented here.[1]

b. The relative dearth of case law on the constitutionality of the collection and analysis of an arrestee's DNA is unsurprising, because that practice is a relatively recent one. Although the federal government and all fifty States have laws authorizing the collection and analysis of DNA from *convicted* individuals, the first law authorizing DNA collection and analysis from *arrested* individuals did not take effect until 1999. See Julie Samuels et al., *Collecting DNA From Arrestees: Implementation*

---

[1] The other decisions cited by petitioner either (1) have been withdrawn, see *United States* v. *Pool*, 621 F.3d 1213 (9th Cir. 2010), vacated as moot, 659 F.3d 761 (2011); (2) come from federal district courts or intermediate state courts, see *United States* v. *Fricosu*, 844 F. Supp. 2d 1201 (D. Colo. 2012); *United States* v. *Purdy*, Crim. No. 05-204, 2005 WL 3465721 (D. Neb. Dec. 19, 2005); *People* v. *Buza*, 129 Cal. Rptr. 3d 753 (Ct. App.), cert. granted, 262 P.3d 854 (Cal. 2011); *In re Welfare of C.T.L.*, 722 N.W.2d 484 (Minn. Ct. App. 2006); or (3) involve a materially different aspect of a DNA statute, see *Mario W.* v. *Kaipio*, 281 P.3d 476 (Ariz. 2012) (invalidating analysis of DNA from juveniles charged with certain offenses).

Lessons, Nat'l Inst. Just. J., June 2012, at 19 (Samuels); Michelle Hibbert, *DNA Databanks: Law Enforcement's Greatest Surveillance Tool?*, 34 Wake Forest L. Rev. 767, 775 (1999). The federal government and twenty-eight States now have laws applicable to arrestees; most of the state laws postdate the enactment of the federal law in 2005, see Samuels 19, and Maryland's temporary expansion to arrestees was enacted only in 2008, see p. 2, *supra*.

As the limited body of existing case law illustrates, the development of the legal framework governing Fourth Amendment challenges to DNA collection and analysis is still in its infancy. As the Fourth Circuit noted just weeks ago in a related context, "[t]he general issue of a person's reasonable expectation of privacy in his DNA is a developing and unsettled area of the law, one that has not yet been addressed by the Supreme Court." *United States* v. *Davis*, 690 F.3d 226, 240 (2012). The lower courts are only starting to come to grips with such foundational questions as what constitutes the applicable search or seizure triggering the protection of the Fourth Amendment, compare *Mitchell*, 652 F.3d at 406-407 (concluding that the collection and analysis of DNA constitute "two separate 'searches'"), with Pet. 26 (contending that "[t]here is one search"), and what analytical framework should govern DNA-related claims by arrestees, compare *Mitchell*, 652 F.3d at 403 (applying the "totality of the circumstances" balancing test), with *Anderson*, 650 S.E.2d at 706 (upholding DNA collection "as a part of routine booking procedures"), and Pet. 13 n.5 (suggesting that "there are still other theories of Fourth Amendment jurisprudence that could be applied").

Because the law in this area is so undeveloped, moreover, new arguments are still gaining traction. The Fourth Circuit's decision in *Davis*—which issued after

the petition for certiorari in this case was filed—provides a recent example. In that case, the Fourth Circuit held that the extraction and analysis of DNA from a *victim* violated the Fourth Amendment, but that suppression of the resulting evidence was unwarranted under the "good faith" exception of *United States* v. *Leon*, 468 U.S. 897 (1984). See *Davis*, 690 F.3d at 240-257. In so holding, the Fourth Circuit expressly distinguished the decision below, noting that the Maryland Court of Appeals "did not address at all the application of the good faith exception, nor is there any indication in the opinion that it was asked to do so." *Id.* at 250 n.29. Even beyond the shallowness of the claimed conflict, therefore, this Court would benefit from further maturation in the law before granting review on the question presented here.

c. The Court can be confident that additional opportunities will arise in short order to consider the constitutionality of the collection and analysis of DNA from arrestees. Of the cases in the asserted conflict, two of the three were decided within the last fifteen months. And there are at least two cases currently pending in a federal court of appeals or state court of last resort presenting the same question—both involving challenges to the application of California's DNA statute. In *Haskell*, *supra*, the en banc Ninth Circuit held oral argument on September 19; *Buza*, *supra*, is fully briefed and awaiting oral argument in the California Supreme Court. Further percolation is thus not only warranted, but already occurring.

2. The developments in the case law have taken place against the backdrop of similarly rapid developments in the science and technology of DNA analysis. In particular, recent discoveries suggest that the amount of personal information contained in a DNA profile is much greater than previously believed.

In defending the collection and analysis of respondent's DNA, petitioner contends that the "non-coding loci" it uses to prepare DNA profiles "do not correspond to any biological traits or phenotypical characteristics," such that "[t]he end result" is "useful only as an identifier" and "reveals nothing else about th[e] person." Pet. 16. That premise formed a central justification for the enactment of the federal DNA statute, see, *e.g.*, H.R. Rep. No. 900, 106th Cong., 2d Sess., Pt. I, at 9, 27 (2000), and it has been relied upon by courts that have upheld the collection and analysis of DNA from arrestees, see, *e.g.*, *Mitchell*, 652 F.3d at 408.

Even before the decision in this case, the scientific community had hotly debated the significance of "non-coding loci." See, *e.g.*, Elizabeth E. Joh, *Reclaiming 'Abandoned' DNA: The Fourth Amendment and Genetic Privacy*, 100 Nw. U. L. Rev. 857, 870 & n.74 (2006). In a series of groundbreaking papers published after the petition for certiorari was filed, however, scientists have shown that "non-coding loci"—colloquially known as "junk DNA"—"turn out to play critical roles in controlling how cells, organs and other tissues behave." Gina Kolata, *Bits of Mystery DNA, Far From 'Junk,' Play Crucial Role*, N.Y. Times, Sept. 6, 2012, at A1. That widely reported discovery was "considered a major medical and scientific breakthrough," with "enormous implications for human health." *Ibid.*

The evolving scientific understanding of the information contained in DNA—particularly in "non-coding loci" such as those used in preparing DNA profiles—provides a further reason for permitting further percolation before granting review on the question presented here. Awaiting further developments not only will aid the Court in its consideration of the question presented here, but may well help to resolve any conflict in the lower

courts on that question. In *Mitchell*, for example, the Third Circuit expressly acknowledged that "technological advancements" in the understanding of "junk DNA" could justify reconsideration of its holding that the Fourth Amendment permits the collection and analysis of DNA from arrestees. 652 F.3d at 408.

3. In addition to the developments in the case law and science, the legal landscape is also shifting as officials adopt new uses of DNA analysis and refine the governing laws. For example, law-enforcement officials are increasingly using DNA analysis not just to link an arrestee to other offenses, but to engage in "familial searching," whereby partial DNA matches involving an arrestee can be used to link the arrestee's *family members* to other offenses. See *Haskell*, 669 F.3d at 1079 (Fletcher, J., dissenting). Although the current version of the Maryland law prohibits familial searching of the state DNA database, see Md. Code Ann., Pub. Safety § 2-506(d), the laws of other jurisdictions permit the practice. See Federal Bureau of Investigation, *Familial Searching* (last visited Oct. 12, 2012) <tinyurl.com/familialdnasearching> (noting that, as of June 2011, California, Colorado, Texas, and Virginia performed familial searching).

Notwithstanding the recent discoveries concerning the significance of "non-coding loci," moreover, the Federal Bureau of Investigation (FBI) is currently in the process of implementing a proposal to expand the number of loci used to create the DNA profiles in the nationwide database system used by federal and state law enforcement. See Federal Bureau of Investigation, *Planned Process and Timeline for Implementation of Additional CODIS Core Loci* (last visited Oct. 12, 2012) <tinyurl.com/newloci>. Going forward, therefore, it is unclear which loci will be used to prepare DNA pro-

files—a fact that, depending on the information contained in those loci, may bear on the appropriate constitutional analysis.

At the same time, States are continuing to debate whether to adopt new DNA statutes or to refine existing ones. See DNAResource.com, *2011 DNA Database Legislation* (Jan. 21, 2012) <tinyurl.com/dnalegislation> (listing pending bills). Even among the existing laws, moreover, there are material variations as to their scope. Thirteen States collect DNA from all felony arrestees, while fifteen States collect DNA only from arrestees for certain enumerated felonies; seventeen States authorize DNA collection and analysis immediately upon arrest, while eleven States require arraignment or a judicial determination of probable cause before that process is initiated or completed; and twenty-one States require the arrestee to request expungement of the DNA sample and profile in the event the arrestee is not convicted, while seven States place that burden on the State. See Samuels 20-21, 23. In considering a challenge to California's DNA statute, members of the en banc Ninth Circuit recently suggested that at least some of those differences may be relevant to the constitutional analysis. See, *e.g.*, Oral Arg. at 5:52-8:43, *Haskell*, *supra* (No. 10-15152) (9th Cir. Sept. 19, 2012) <tinyurl.com/haskellargument>.[2]

At a minimum, the variations in existing laws underscore the need for further development in the case law before this Court intervenes. For now, the Court's review, on a difficult constitutional question involving an emerging technology, would be premature.

---

[2] Notably, no other State has filed an amicus brief supporting the petition for certiorari.

B. This Case Is A Poor Vehicle For Resolution Of Any Conflict

A number of vehicle issues unique to this case further counsel against the Court's review.

1. To begin with, the Maryland Court of Appeals did not, as petitioner contends, "str[ike] down Maryland's DNA Collection Act as applied to arrestees." Pet. 7. Instead, the court invalidated the Act *only as applied to petitioner*. See, *e.g.*, Pet. App. 70a. In so doing, the court relied on the fact that respondent had already been "accurately" identified by the time his DNA sample was analyzed—with the result that "the only State interest served by the collection of his DNA" was "[s]olving cold cases." *Id.* at 64a-65a, 66a. The court therefore left open the possibility that, in at least some cases in which DNA analysis was necessary for identification purposes in connection with the crime for which the arrestee had been charged, the collection and analysis of an arrestee's DNA pursuant to the Act would be valid. *Id.* at 67a.

For that reason and others, leaving the decision below in place would have only a limited impact on law enforcement in Maryland. In its stay application (at 16-17), petitioner contended that the collection and analysis of DNA from arrestees had resulted in fifty-eight prosecutions in Maryland, and a smaller number of prosecutions in other States, over the first three years that the temporary expansion of the Act to arrestees had been in effect. That number creates a misleading impression, however, because the Maryland Court of Appeals made clear that its decision would not affect the collection and analysis of DNA from individuals who are ultimately convicted of a criminal offense. Pet. App. 58a. And as noted above, the court also made clear that it was not prohibiting the collection and analysis of DNA from all arrestees. *Id.* at 67a. The Maryland Court of Appeals'

decision would therefore prevent the collection and analysis of DNA only from individuals who are charged with, but not ultimately convicted of, a criminal offense—and only in a subset of those cases, to boot.

The practical consequences of the Maryland Court of Appeals' decision are further limited because the expansion of the Maryland DNA Collection Act to arrestees is due to expire on December 31, 2013. The Maryland General Assembly has taken no action to make that expansion permanent or otherwise extend its applicability. And it is purely speculative to "assume the General Assembly w[ill] vote to extend and reauthorize the provision" in its upcoming 2013 legislative session. Br. of Md. Legislators 8. At least as matters currently stand, therefore, the decision below will affect only those individuals who are charged with (but not ultimately convicted of) a qualifying criminal offense in Maryland before December 31, 2013. Conversely, should this Court grant review, it would be doing so in full knowledge of the possibility that the underlying statute could become obsolete within a matter of months.[3]

2. In addition, this case is a poor vehicle for the Court's review because petitioner failed to develop the full panoply of potential arguments in support of the constitutionality of DNA collection and analysis and the admissibility of the fruits of that analysis. In particular, as the Fourth Circuit noted in *Davis*, petitioner did not argue below that the suppression of the evidence of the

---

[3] Amici legislators further contend (Br. 8-9) that the decision below affirmatively *disables* the Maryland General Assembly from reauthorizing the expansion to arrestees. That is incorrect. Because the Maryland Court of Appeals did not facially invalidate the Act, the General Assembly could validly reauthorize the expansion, leaving the Act in effect as to its constitutional applications.

DNA match was unwarranted under the "good faith" exception to the exclusionary rule. See 690 F.3d at 250 n.29. As the Maryland Court of Appeals noted, moreover, petitioner "d[id] little more than mention the special needs [doctrine]," Pet. App. 14a, which some courts have adopted as the appropriate analytical framework for DNA-related claims. See, *e.g.*, *United States* v. *Amerson*, 483 F.3d 73, 78 (2d Cir.) (claim by probationer), cert. denied, 552 U.S. 1042 (2007). Even if those arguments have not been forfeited altogether, the Court should await a case in which they were more fully developed and addressed below.

Finally, this case is an especially poor vehicle because of the lack of an extensive evidentiary record concerning the competing interests and the science and technology behind DNA analysis. The record, for example, contains no evidence of the number of hits that result from the collection and analysis of DNA from arrestees; no evidence of the rate at which those hits occur; and no evidence of the number of hits that involve arrestees who are not ultimately convicted of the offense of arrest. Cf. *Samson*, 547 U.S. at 853 (relying on the "empirical evidence presented" in evaluating the state's interests). Should the Court grant review in this case, it would have to rely on the parties and amici to develop the relevant factual record before this Court in the first instance. It would be preferable for the Court to await a case that already possesses such an evidentiary record. And for all of the reasons stated above, it would be prudent for the Court to wait to grant review on the question presented here until the relevant legal and factual environment is more settled. In short, the question presented may warrant the Court's attention one day—but it does not require it now.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL B. DEWOLFE
Public Defender
STEPHEN B. MERCER
Chief Attorney,
Forensics Division
OFFICE OF THE PUBLIC DEFENDER
6 Saint Paul Street,
Suite 1400
Baltimore, MD 21202

KANNON K. SHANMUGAM
JAMES M. MCDONALD
DAVID M. HORNIAK
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

OCTOBER 2012

REPLY BRIEF

RECORD
AND
BRIEFS

No. 12-207

IN THE
Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

ALONZO JAY KING, JR.,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

REPLY BRIEF FOR PETITIONER

Douglas F. Gansler
Attorney General of Maryland
Katherine Winfree
Chief Deputy Attorney General
*Brian S. Kleinbord
Robert Taylor, Jr.
Assistant Attorneys General
Office of the Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6435
bkleinbord@oag.state.md.us
Counsel for Petitioner

**Counsel of Record*

Library of Congress
Law Library

TABLE OF CONTENTS

ARGUMENT 1

I. " Percolation" is part of the problem. 1

II. The identification of criminal suspects is not "emerging technology," nor is the forensic use of DNA. 3

III. The scope of the Maryland decision is quite broad. 5

CONCLUSION 7

TABLE OF AUTHORITIES

Cases:

Anderson v. Commonwealth, 274 Va. 469, (Va. 2007), *cert. denied*, 553 U.S. 1054 (2008). . . . 2

Andrews v. State, 533 So.2d 841 (Fla. App. Ct. 1988). 3

Bartnicki v. Vopper, 532 U.S. 514 (2001). 4

Cobey v. State, 559 A.2d 391 (Md. Ct. Spec. App. 1989). 3

Haskell v. Harris, 669 F.3d 1049 (9th Cir. (2012), *en banc review granted*, 686 F.3d 1121 (argued Sept. 19, 2012) 2

In re Welfare of C.T.L., 722 N.W.2d (Minn. App. 2006). 2

King v. State, 425 Md. 550 (2012). 6

Mario W. v. Kaipio, 281 P.3d 476 (Ariz. 2012). . . . 2

Maryland v. King, 2012 U.S. LEXIS 5018 (2012). 2

People v. Buza, 197 Cal. App. 4th 1424 (Cal. Ct. App. 2011), *cert. granted*, 132 Cal. Rptr. 3d 616 (Cal. 2011). 2

Page

People v. Jennings, 96 N.E. 1077 (1911). 3

People v. Wesley, 533 N.Y.S.2d 643 (County Court of Albany, 1988). 3

United States v. Am. Library Ass'n., 539 U.S. 194 (2003). 4

United States v. Davis, 690 F.3d 226 (4th Cir. 2012) 4

United States v. Fricosu, 2012 U.S. Dist. LEXIS 22654 (D. Colo. 2012) 2

United States v. Jones, 132 S. Ct. 945 (2012). 4

United States v. Kelly, 55 F.2d 67 (2d Cir. 1932). 3

United States v. Mitchell, 652 F.3d 387, (3rd Cir. 2011), *cert. denied*, 132 S.Ct. 1741 (2012) 2

United States v. Pool, 621 F.3d 1213 (9th Cir. 2010) 2

United States v. Purdy, 2005 U.S. Dist. LEXIS 40433 (D. Neb. 2005). 2

Constitutional Provisions:

Fourth Amendment. . . . . 1, *passim*

Page

Miscellaneous:

Richard J. Reece, *Analysis of Genes and Genomes* 100 (2004).. 3

Office of Technology Assessment, *Genetic Witness: Forensic Uses of DNA Testing* 8 (1990). 3

Sara H. Katsanis and Jennifer K. Wagner, *Characterization of the Standard and Recommended CODIS Markers*, 57 J. Forensic Sci. ___ (in press, published online Aug. 24, 2012).. 5

Karen Kreeger, Sara H. Katsanis and Jennifer K. Wagner, *Reconciling ENCODE and CODIS*, Penn Medicine News, Sept. 18, 2012. 5

King concedes that there are sharp divisions in the lower courts on the collection of DNA evidence from arrestees. King further seems to agree that the issue this case presents is critical, and that the Fourth Amendment implications of DNA collection should be addressed by this Court. These are all compelling reasons for granting certiorari. The reasons presented for denying certiorari in this case, by contrast, do not withstand scrutiny.

In his Brief In Opposition, King suggests that the disarray in the lower courts is a sign that the issue should await "further percolation," (Brief In Opposition at 10), that DNA comparison is an "emerging technology," (Brief In Opposition at 17), and that the Maryland Court of Appeals' decision applies only to a "subset" of arrestees under the statute. (Brief In Opposition at 19). All three contentions are mistaken, and none refutes the reasons given by the State for granting certiorari in this case.

I. "Percolation" is part of the problem.

In the past seven years, ten courts – five state and five federal – have issued published opinions regarding the constitutionality of DNA collection from arrestees. All have considered the practice on straightforward Fourth Amendment grounds. While the ten decisions have involved different statutes with different provisions, none of the decisions (with the limited exception of Arizona's) has depended upon provisions unique to any particular statute. Of these ten opinions, five have upheld the collection of DNA from arrestees,

and five have found it to be unconstitutional.[1]

Ten cases in seven years, in a variety of state and federal courts, resulting in an even split in outcomes, is not "percolation." It is disarray. And as the Chief Justice noted when granting a stay of the Court of Appeals' decision in this case, every time a state is precluded from contributing information into the database, all users of the database suffer. *Maryland v. King*, 2012 U.S. LEXIS 5018 (2012), slip op. at 3. Because of the interconnected nature of the DNA identification system, this is a subject area where every individual state or federal court decision has ramifications outside of that jurisdiction.

Additional delay will only create additional confusion. Criminal suspects, prosecutors, and the lower courts require clarity and uniformity in the application of the Fourth Amendment to the use of DNA for identification purposes.

---

[1] Collection was found constitutional in *United States v. Mitchell*, 652 F.3d 387 (3rd Cir. 2011), *cert. denied*, 132 S. Ct. 1741 (2012); *Haskell v. Harris*, 669 F.3d 1049 (9th Cir. 2012), *en banc review granted*, 686 F.3d 1121 (argued Sept. 19, 2012); *United States v. Pool*, 621 F.3d 1213 (9th Cir. 2010); *United States v. Fricosu*, 2012 U.S. Dist. LEXIS 22654 (D. Colo. 2012); and *Anderson v. Commonwealth*, 274 Va. 469, 650 S.E.2d 702 (Va. 2007), *cert. denied*, 553 U.S. 1054 (2008). In addition to this case, arrestee collection has been struck down, in whole or in part, in *Mario W. v. Kaipio*, 281 P.3d 476 (Ariz. 2012); *People v. Buza*, 197 Cal. App. 4th 1424, 129 Cal. Rptr. 3d 753 (Cal. Ct. App. 2011), *cert. granted*, 132 Cal. Rptr. 3d 616, 262 P.3d 854 (Cal. 2011); *In re Welfare of C.T.L.*, 722 N.W.2d 484 (Minn. App. 2006); and *United States v. Purdy*, 2005 U.S. Dist. LEXIS 40433 (D. Neb. 2005).

II. The identification of criminal suspects is not "emerging technology," nor is the forensic use of DNA.

The technique at the heart of this case is the use of immutable physical characteristics to identify people who have been arrested, and then using that identifying information to solve crimes. This technique has existed, in less precise, more subjective forms, at least since the introduction of the Bertillon system in the late 19th century. Courts in the United States have allowed the use of fingerprint identification for over a century. *See People v. Jennings*, 96 N.E. 1077, 1081-82 (1911) (allowing admission of fingerprint evidence to identify individual). The collection and use of biometric identification data has never been seriously questioned prior to the DNA era. *See United States v. Kelly*, 55 F.2d 67, 70 (2d Cir. 1932) (rejecting claim that collection of fingerprints after arrest was unlawful).

The basic theory and technology for deriving unique identifiers from a person's DNA have existed at least since 1975. Richard J. Reece, *Analysis of Genes and Genomes* 100 (2004). In 1985, DNA evidence first was used to identify a criminal suspect in the United Kingdom. Office of Technology Assessment, *Genetic Witness: Forensic Uses of DNA Testing* 8 (1990). Courts in the U.S. began addressing the forensic use of DNA identification shortly thereafter. *See Andrews v. State*, 533 So.2d 841 (Fla. App. Ct. 1988); *People v. Wesley*, 533 N.Y.S.2d 643 (County Court of Albany, 1988); *Cobey v. State*, 559 A.2d 391, 398 (Md. Ct. Spec. App. 1989). Congress formed the CODIS database in 1994.

Thus, the forensic application of DNA science has been in common use longer than GPS devices (see *United States v. Jones*, 132 S. Ct. 945 (2012)), the internet (see *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003)), and cell phones (see *Bartnicki v. Vopper*, 532 U.S. 514 (2001). It is in no sense "emerging."

King argues that the lack of an "extensive evidentiary record" makes this case a poor vehicle for review. (Brief in Opposition at 20). None of the "missing" evidence he cites, however, is relevant to Fourth Amendment analysis, and moreover the statistics he describes are matters of public record. The process by which King's DNA was collected, analyzed, and compared is routine and very common. Similarly, King throws out the "good faith exception" discussion in the recent case of *United States v. Davis*, 690 F.3d 226 (4th Cir. 2012), as a basis for denying certiorari in this case. (Brief in Opposition at 14). *Davis* addressed a much different issue – the collection of DNA evidence not undertaken pursuant to a statute or a warrant. There is no reason why this Court need consider or discuss the "good faith" exception in the context of King's case. It is simply irrelevant here.

King also cites a New York Times article about a research project known as ENCODE as evidence that DNA identification constitutes an "emerging technology." (Brief in Opposition at 15). ENCODE is an ongoing endeavor and many of its preliminary findings were already known to the scientific community before the project was given greater exposure in the national media. As King notes, the ENCODE publicity occurred after Maryland's petition was filed in this case;

nonetheless, an article cited in that Petition for the proposition that the 13 CODIS loci did not reveal any phenotypical information had already incorporated the ENCODE findings before reaching that conclusion. Sara H. Katsanis and Jennifer K. Wagner, *Characterization of the Standard and Recommended CODIS Markers*, 57 J. Forensic Sci. ___ (in press, published online Aug. 24 2012). *See also* Karen Kreeger, Sara H. Katsanis, and Jennifer K. Wagner, *Reconciling ENCODE and CODIS*, Penn Medicine News, Sept. 18, 2012 (http://news.pennmedicine.org/blog/2012/09/reconciling-encode-and-codis.html).

Certainly the boundaries of human knowledge and understanding are expanding every day. However, that will always be the case. Twenty-seven states and the federal government have adopted laws regarding the collection of DNA from arrestees. Regardless of future advances in molecular biology, the use of DNA for identification purposes has existed for some time and will continue to exist for the foreseeable future. States have been collecting DNA from arrestees since 1999. Nearly 14 years later, the constitutionality of these statutes should be clarified.

III. The scope of the Maryland decision is quite broad.

King claims that the decision of the Court of Appeals affects only "a subset" of arrestees and that the holding applied to King only. (Brief in Opposition at 19). However, the "subset" of arrestees affected by this decision consists of every qualified arrestee that Maryland has ever taken into custody since the law was enacted, and every qualified arrestee that Maryland is likely to take into custody in the

foreseeable future. A "subset" consisting of 100 percent of all past and future arrestees may be a subset, but it is a very inclusive subset.

The Court of Appeals' decision claimed to be only "as applied," but the number of individuals to which the ruling would NOT apply appears to be limited to two, and those two are fictional. The Court held that the State could use DNA testing to identify an arrestee if that suspect had no face and no fingerprints, and made reference to the 1997 science fiction film "Face/Off" as an example of such a thing.[2] *King v. State*, 425 Md. 550, 601 n.35 (2012). To date, Maryland has no record of having arrested a faceless, fingerprintless person for a qualifying felony, and therefore the distinction between the "as applied" ruling and a "facial" ruling is essentially nonexistent.

The fact is that the Court of Appeals' decision eviscerates a duly enacted law. Under the ruling, public safety officials in Maryland will be prevented from carrying out the primary function of the statute – obtaining identifying DNA information from all qualified arrestees. Moreover, because that identifying information could not be shared with the national database, other States – some of which have adopted different views on the constitutionality of DNA collection – will be unable to use that identifying information to solve crimes and/or exonerate suspects.

---

[2] In the film, characters portrayed by John Travolta and Nicholas Cage have their faces surgically removed and exchanged to thwart a terrorist plot.

CONCLUSION

For the foregoing reasons and those set forth in the original Petition, the Petition for a writ of certiorari should be granted.

Respectfully submitted,

Douglas F. Gansler
Attorney General of Maryland

Katherine Winfree
Chief Deputy Attorney General

*Brian S. Kleinbord
Robert Taylor, Jr.
Assistant Attorneys General

Office of the Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6435
bkleinbord@oag.state.md.us

Counsel for Petitioner

*Counsel of Record
October 24, 2012

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
SEP 12 2012
OFFICE OF THE CLERK

No. 12-207

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MARYLAND,
Petitioner.

v.

ALONZO JAY KING, JR.,
Respondent.

On Petition For Writ Of Certiorari To The Court of Appeals for Maryland

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER, THE STATE OF MARYLAND, BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY

STEVE COOLEY
District Attorney of Los Angeles County
IRENE WAKABAYASHI
Head Deputy, Appellate Division
PHYLLIS ASAYAMA
Deputy District Attorney
ROBERTA SCHWARTZ
Deputy District Attorney *Counsel of Record*
Appellate Division
320 West Temple Street, Suite 540
Los Angeles, California 90012
Telephone: (213) 974-1616
Attorneys for Amicus Curiae

TABLE OF CONTENTS

		Pages
INTEREST OF AMICUS CURIAE		2
SUMMARY OF ARGUMENT		2
ARGUMENT		
I	AN ARESTEE HAS A SIGNIFICANTLY REDUCED EXPECTATION OF PRIVACY	3
II	EXPANSION OF THE DNA DATABASE TO INCLUDE FELONYARESTEES AIDS IN THE PURSUIT OF JUSTICE AND EXONERATION OF THOSE WRONGFULLY ACCUSED OF CRIMES WHILE PROTECTING THE PULBIC	10
III	POLICE SHOULD NOT BE BLOCKD FROM LAWFULLY OBTAINING THE MOST RELIABLE MEANS OF IDENTIFICATION	17
IV	DNA SAMPLING DURING BOOKING OF A FELONY ARRESTEE IS ANOTHER BIOMETRIC MEASURE OF IDENTITY TO BE INCLUDED IN A DATABASE	21
CONCLUSION		26

TABLE OF AUTHORITIES

Pages

Cases

Boroian v. Mueller
616 F.3d 60, 67 (1st Cir. 2010) 6, 9

City of Indianapolis v. Edmond
531 U.S. 32, 121 S. Ct. 447,
148 L. Ed. 2d 333 (2000) 4

Cupp v Murphy
(1973) 412 U.S. 291 24

Davis v. Mississippi
394 U.S. 721, 727-28, 89 S. Ct. 1394, 1395, 22 L. Ed. 2d 676 (1969) 4, 23

Florence v. Bd. of Chosen Freeholders of County of Burlington
132 S. Ct. 1510, 1523,
182 L. Ed. 2d 566 (2012) 3

Haskell v. Harris
669 F.3d 1049, 1064-65 reh'g en banc granted, 686 F.3d 1121 (9th Cir. 2012) 15

Hayes v. Florida
470 U.S. 811, 813-18, 105 S. Ct. 1643, 1645, 84 L. Ed. 2d 705 (1985) 4

Illinois v. Lafayette
462 U.S. 640, 647, 103 S. Ct. 2605, 2608, 77 L. Ed. 2d 65 (1983) 25

Jones v. Murray
962 F.2d 302, 306-07 (4th Cir. 1992) 5, 25

People v. Clark
30 Cal. App.3d 549, 558-59 (1973) 23

People v. Johnson
(2006) 139 Cal.App.4th 1135 24

People v. McInnis
6 Cal. 3d 821, 825-26 (1972) 23

People v. Robinson
47 Cal. 4th 1104, 1121 (2010) 5, 6
Rise v. Oregon
59 F.3d 1556, 1560 n. 2 (9th Cir. 1995) 4
State ex rel. Bruns v. Clausmeier
154 Ind. 599, 57 N.E. 541 (1900) 22
United States v. Diaz-Castaneda
494 F.3d 1146, 1153 (9th Cir. 2007) 9
United States v. Kelly
55 F.2d 67, 69 (2nd Cir. 1932) 20
United States v. Kincade
379 F.3d 813, 837 (9th Cir. 2004) 5
United States v. Mitchell
652 F.3d 387, 410-12 (3rd Cir. 2011) 5

Other Authorities
Los Angeles County Charter
Section 25 1

Supreme Court Rules
Rule 37.2 1
Rule 37.4 1

California Government Code
Section 26500 2

Penal Code
Section 11112.1 24

No. 12-207

In The
SUPREME COURT OF THE UNITED STATES

STATE OF MARYLAND
Petitioner,

v.

ALONZO JAY KING, JR.
Respondent.

On Petition For Writ Of Certiorari
To The Court of Appeals of Maryland

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER, THE STATE OF MARYLAND, BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY

Amicus curiae, Steve Cooley, District Attorney for the County of Los Angeles, State of California, submits this brief for filing in support of the petition for a writ of certiorari to review the judgment of the Court of Appeals of Maryland as the authorized law officer of the county, pursuant to Supreme Court Rule 37.2(a) and 37.4.[1]

---

1. Los Angeles County Charter section 25 (1995) states:

> Each County officer, Board or Commission shall have the powers and perform the duties now or

(continued...)

INTEREST OF AMICUS CURIAE

Amicus curiae, as the executive officer charged with the prosecution of crime in the most populous county in California, has a strong interest in the effective enforcement of the laws of the state.

SUMMARY OF ARGUMENT

California is one of the 27 states participating in the Combined DNA Index System [hereinafter CODIS] by submitting DNA samples obtained from felony arrestees. Requiring a person who is arrested for a felony, based on probable cause, to submit a DNA sample during the booking process is not an impermissible search. It is a minimal intrusion which establishes with absolute certainty the identification of the arrestee. This data, along with his booking photograph, fingerprints, photographs of tattoos, height and weight measurements, address, hair and eye color descriptions, and other driver's license information, are incorporated into a database which may be accessed at a later time for comparison

---

(...continued)

> hereafter prescribed by general law, and by this charter as to such officer, Board of Commission.

(Footnote omitted.) It is provided in the California general law that:

> The district attorney is the general prosecutor, except as otherwise provided by law. The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for the public offenses.

Cal. Gov't Code § 26500 (West 1998).

to data from other crimes. Resolution of open cases, reopening cases of convicted persons, and protection of society outweigh the minimal intrusion of an arrestee's reduced expectation of privacy.

ARGUMENT

I

AN ARRESTEE HAS A SIGNIFICANTLY REDUCED EXPECTATION OF PRIVACY

The Court below clearly erred in rejecting a minimally intrusive method for obtaining biometric data of arrested felons.

The felony arrestee can be photographed, finger-printed, and even asked to remove clothing for examination and photographing of tattoos, scars and marks. He or she can be subjected to an intrusive body cavity search. *Florence v. Bd. of Chosen Freeholders of County of Burlington*, 132 S. Ct. 1510, 1523, 182 L. Ed. 2d 566 (2012).

The arrestee's height, weight and hair color are recorded along with his name, address, social security number, driver's license information and employment data. Clearly, a DNA profile adds a significant biometric measure of identity without devaluing or compromising lingering expectations of privacy by the arrestee. Obtaining a DNA sample by swabbing the cheek is minimally intrusive and likely to be the least memorable event of the booking process. Indeed, some may consider the physical manipulation by the custodial officer of the arrestee's hands and fingers more intrusive and demeaning than the simple swabbing of a cheek.

> The dissent suggests that our comparison to traditional fingerprinting is inapt because fingerprints "are personal attributes that are routinely exposed to the public at large in daily life" and, accordingly, the gathering of fingerprints, unlike the drawing of blood, implicates "a categorically different and lesser expectation of privacy." Dissenting Op. at 29. However, the fingerprints gathered by law enforcement officials and included in fingerprint identification data banks are not ones that have been left behind voluntarily on doorknobs and water glasses. They are the ones gathered by holding the person's hand firmly and taking the prints. Much like the process of providing a blood sample, providing one's fingerprints can be quick and simple if one submits voluntarily, but has the potential for the use of force if resisted. It is for this reason that, outside the "booking" process to which we analogize, courts do generally require some level of individualized suspicion to support the seizure necessary to gather a person's fingerprints.

Rise v. Oregon, 59 F.3d 1556, 1560 n. 2 (9th Cir. 1995) (citing *Hayes v. Florida*, 470 U.S. 811, 813-18, 105 S. Ct. 1643, 1645, 84 L. Ed. 2d 705 (1985); *Davis v. Mississippi*, 394 U.S. 721, 726-28, 89 S. Ct. 1394, 1397, 22 L. Ed. 2d 676 (1969)) *overruled on other grounds by City of Indianapolis v. Edmond,* 531 U.S. 32, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000).

The reduced expectation of privacy of felony arrestees has been recognized by federal circuit courts. *See, Jones v. Murray*, 962 F.2d 302, 306-07 (4th Cir. 1992), *United States v. Mitchell*, 652 F.3d 387, 410-12 (3rd Cir. 2011).

The observation that arrestees have a reduced expectation of privacy was noted in *United States v. Kincade,* 379 F.3d 813, 837 (9th Cir. 2004) and recently cited with approval by the California Supreme Court in *People v. Robinson* 47 Cal. 4th 1104, 1121 (2010).

> With regard to any privacy interest in identifying information, it is established that individuals in lawful custody cannot claim privacy in their identification. "Though, like fingerprinting, collection of a DNA sample for purposes of identification implicates the Fourth Amendment, persons incarcerated after conviction retain no constitutional privacy interest against their correct identification." [*Groceman v. U.S. Dept. of Justice*, 354 F.3d 411, 413–414 (5th Cir. 2004)]. In *Kincade*, the court explained that "the DNA profile derived from the defendant's blood sample establishes only a record of the defendant's identity-otherwise personal information in which the qualified offender can claim no right of privacy once lawfully convicted of a qualifying offense **(indeed, once lawfully arrested and booked into state custody)**. For, as we recognized in *Rise* '[o]nce a person is convicted of one of the felonies included as predicate offenses under [the

> Act], his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from blood sampling.' [*Rise,* 59 F.3d 1556 (9th Cir. 1995)].

People v. Robinson , 47 Cal. 4th 1104, 1121 (2010) (emphasis added) (citations omitted).

The absence of a legitimate expectation of privacy at booking is well-established.

> Boroian suggests that the government does not need his DNA profile for "identification" purposes because it already has other means of identification, such as his fingerprints and social security number. However, the fact that the government may lawfully retain and access these more traditional means of identifying Boroian only emphasizes that the government's retention and matching of his DNA profile does not intrude on Boroian's legitimate expectation of privacy. At present, Boroian's DNA profile simply functions as an additional, albeit more technologically advanced, means of identification

Boroian v. Mueller, 616 F.3d 60, 67 (1st Cir. 2010).

Obviously government has a strong interest in ascertaining with certainty the identity of those who are arrested for felonies. That identification is clearly enhanced if DNA is sampled and included in CODIS. A suspect who is arrested for theft and has a

DNA sample matched to the profile of an unknown murder suspect from 2002 should not be eligible for own recognizance release. An arrestee's potential involvement in other unsolved crimes is a factor in determining pretrial release. This was recently recognized by the court in *Mitchell*, which upheld the gathering of DNA samples from federal arrestees.

> [T]here are two components to a person's identity: "who that person is (the person's name, date of birth, etc.) and what that person has done (whether the individual has a criminal record, whether he is the same person who committed an as-yet unsolved crime across town, etc.)." The second component—what a person has done—has important pretrial ramifications. Running an arrestee's DNA profile through CODIS could reveal matches to crime-scene DNA samples from unsolved cases. Whether an arrestee is possibly implicated in other crimes is critical to the determination of whether or not to order detention pending trial. *See* 18 U.S.C. § 3142(g)(3)(A) (stating that factors to be considered in the bail determination include a person's "past conduct" and "criminal history"). To the extent that DNA profiling assists the Government in accurate criminal investigations and prosecutions (both of which are dependent on accurately identifying the suspect), it is in the Government's interest to have this information as soon as possible. Collecting DNA samples from arrestees can speed

> both the investigation of the crime of arrest and the solution of any past crime for which there is a match in CODIS. Moreover, "use of CODIS promptly clears thousands of potential suspects—thereby preventing them from ever being put in that position, and advancing the overwhelming public interest in prosecuting crimes accurately." The assistance provided by CODIS is not hypothetical: as of May 2011, CODIS "ha[d] produced over 144,400 hits assisting in more than 138,100 investigations." FBI, CODIS-NDIS Statistics, available at http://www.fbi.gov/about-us/lab/codis/ndis-statistics (last visited July 8, 2011).

Mitchell, 652 F.3d at 414-15 (citations omitted).

As will be discussed below, this interest in correctly identifying the arrestee weighs heavily in favor of DNA collection against the reduced expectation of privacy by a felony arrestee.

> Reasonableness ... is measured in objective terms by examining the totality of the circumstances, and whether a particular search meets the reasonableness standard is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.

Robinson, 47 Cal. 4th at 1120 (internal quotations and citations omitted).

The Maryland Appellate Court's flawed analysis that imagines a "second search" when investigators accessed the DNA database leads to absurd results. Petition for Writ of Certiorari at 58a Maryland v. King ___ S.Ct. ___ (2012) (No. 12-207) [hereinafter *App.*].

> That is, there is no constitutional basis for complaint when the police properly obtain information located in a driver's license or state ID card, and then use it to access additional non-private (but inculpatory) information about the document's owner.

United States v. Diaz-Castaneda, 494 F.3d 1146, 1153 (9th Cir. 2007).

Just as accessing a fingerprint or photgraphic database is not a "second search", accessing the DNA database is not a "second search".

> Other precedents hold that the government's matching of a lawfully obtained identification record against other records in its lawful possession does not infringe on an individual's legitimate expectation of privacy

Boroian v. Mueller, 616 F.3d at 67.

II

EXPANSION OF THE DNA DATABASE TO INCLUDE FELONY ARRESTEES AIDS IN THE PURSUIT OF JUSTICE AND EXONERATION OF THOSE WRONGFULLY ACCUSED OF CRIMES WHILE PROTECTING THE PUBLIC

The premise that DNA technology is unnecessary for identification given the existence of fingerprints is in error. *App.* at 64a. Fingerprint comparison is subject to human interpretation and has resulted in errors. One documented case resulted in an innocent man freed by a DNA comparison after a conviction was secured based upon a fingerprint comparison.

In May 1997, a Boston Police Officer was shot with his own gun after a struggle with his assailant. *DNA's Accuracy Puts Traditional Forensics on Trial*, POPULAR MECHANICS <http://www.popularmechanics.com/science/health/forenscis/3010536> (last visited Sept. 7, 2012). Stephan Cowans was later identified by the officer and another witness as the assailant. A key piece of evidence was a fingerprint left behind by the assailant while running from the officer. The fingerprint was identified as belonging to Cowans. *Ibid.* After serving over five years of a 35-to 50-year sentence, DNA evidence from a cap and sweatshirt left behind by the assailant was analyzed and found not to match Cowans's DNA. A new comparison of

the fingerprints was done by an independent examiner who determined that the original print comparison was in error. *Ibid.* Cowans was exonerated and freed in 2004. *Ibid.*

As noted in the dissent in the opinion below, speculation over elaborate fantasies about potential abuse of information stored in the "junk" DNA[2] being stored in CODIS is not well-taken. *App.* at 79a.

> [B]eyond the fact that the DNA Act itself provides protections against such misuse, our job is limited to resolving the constitutionality of the program before us, as it is designed and as it has been implemented. In our system of government, courts base decisions not on dramatic Hollywood fantasies, *cf. post* at 11493, but on concretely particularized facts developed in the cauldron of the adversary process and reduced to an assessable record. If, as *Kincade's* aligned amici and Judge Reinhardt's

---

2. Through the use of short tandem repeat technology ("STR"), the Bureau analyzes the presence of various alleles located at 13 markers (or loci) on DNA present in the specimen. These STR loci are each found on so-called "junk DNA"-- that is, non-genic stretches of DNA not presently recognized as being responsible for trait coding -- and "were purposely selected because they are not associated with any known physical or medical characteristics." H.R. Rep. No. 106-900(I) at *27.

Kincade, 379 F.3d at 818.

> dissent insist, and when, some future program permits the parade of horribles the DNA Act's opponents fear--unregulated disclosure of CODIS profiles to private parties, genetic discrimination, state-sponsored eugenics, and (whatever it means) the use of CODIS somehow "quite literally, to eliminate political opposition," *post* at 11487--we have every confidence that courts will respond appropriately. As currently structured and implemented, however, the DNA Act's compulsory profiling of qualified federal offenders can only be described as minimally invasive--both in terms of the bodily intrusion it occasions, and the information it lawfully produces.

Kincade, 379 F.3d at 837-38.

A Chicago study which advocated sampling felony arrestees cited a number of cases and statistics in support of DNA collection.
See, Chicago's Study on Preventative Crime, CITY OF CHICAGO (2005), *available at* http://www.dnaresource.com/documents/ChicagoPreventableCrimes-Final.pdf (last visited Sept. 6, 2012). One case cited in the study is illustrative. Geoffrey Griffin was arrested for felony possession of drugs on August 26, 1995. No DNA sample was taken at the time of his arrest and he was not convicted. In July of 1998, a woman was raped and killed by Griffin and DNA evidence was recovered from the crime scene. Griffin was not immediately connected to the

crime because there was no DNA sample taken during the initial felony arrest. Between July 1998 and June 2000, eight more women were murdered and one was raped, but survived. Griffin was finally arrested in June of 2000 and charged with eight murders and one sexual assault. If a DNA sample had been taken and placed with CODIS in 1995, Griffin could have been identified and arrested after the July 1998 murder, and the subsequent eight murders could have been prevented. That was one example illustrating how a DNA sample collected from a felony arrest could have prevented future violent crimes while solving past crimes.

Another example of the importance of arrestee DNA sampling is provided in the case of Anthony Dias.

> Anthony Dias is the poster boy for why police and prosecutors hope Washington will join a growing number of states that require people to give DNA samples as soon as they're arrested in a serious crime, rather than when they're convicted.
>
> In 2005, Dias was released on bail while facing a felony hit-and-run charge in Pierce County. Before the year was up, he went on to commit crimes—including half a dozen rapes—against 19 more people. If he had given a DNA sample after his hit-and-run arrest, detectives could have caught him after the first rape—not the last.
>
> "By the time he committed his next rape crime, he could have been identified,

> arrested, and taken off the streets," Charisa Nicholas, who was tied up and forced to watch as her roommate was raped, told lawmakers recently. "My case would have been the first case prevented."

Washington Considers Collecting DNA upon Arrest, FORENSIC MAGAZINE (Feb. 7, 2012), http://www.forensicmag.com/print/5522 (last visited Sept. 6, 2012).

While many of the examples theorize future crime prevention, there is also a compelling case for how a rational expansion of the DNA database unlocks prison doors for the innocent.

> DNA databases have proven remarkably effective in exonerating the innocent. According to the Innocence Project, there have been 273 post-conviction DNA exonerations in the United States since 1989. In 123 of the cases, the true suspects or perpetrators were also identified. The case of David Allen Jones is a powerful illustration of the benefits of arrestee DNA sampling. Jones, a mentally disabled janitor, was wrongly convicted in 1995 for three murders in the Los Angeles area. See Andrew Blankstein, et al., DNA Analysis Links Inmate to 12 Slayings, L.A. Times, Oct. 23, 2004, at A1. Jones spent nearly nine years in prison. He was released in 2004, after DNA collected at two of the murder scenes was linked to the DNA profile of Chester Dwayne Turner. Although Turner had been arrested 20 times between 1987 and 2002, his DNA

> sample was not collected until after he was convicted of rape in 2002. *Id.* Had the 2004 Amendment been in effect in 1995, it is likely that Jones never would have been imprisoned because police would have had access to Turner's DNA profile. There are few greater injustices than the wrongful imprisonment of an innocent person. The privacy intrusion caused by a buccal swab of a felony arrestee is minor compared to society's compelling goal of ensuring that innocent people are exonerated.

Haskell v. Harris, 669 F.3d 1049, 1064-65 *reh'g en banc granted*, 686 F.3d 1121 (9th Cir. 2012).[3]

Expansion of the DNA databases to include arrestees can only help further the efforts of groups such as Project Innocence to exonerate the wrongfully convicted.

> Showing that DNA evidence does not match a convicted offender is often not enough to exonerate him. In an interview with the Council for Responsible Genetics, Peter Neufeld, co-founder of the Innocence Project, described how DNA databases help exonerate wrongly-convicted individuals: "There are occasions where we get a DNA test result on a material piece of evidence from a crime scene which

---

3. *Haskell v. Harris* is referenced only for its recitation of factual scenarios in which DNA played a roll, and not for any legal precedent.

> would exclude our client, but prosecutors still resist motions to vacate the conviction. In some of those cases, what then tipped the balance in our favor was that the profile of the unknown individual [whose DNA was found at the crime scene] was run through a convicted offender database and a hit was secured. Once we were able to identify the source of the semen or blood... we were then able to secure the vacation of the conviction for our client." He went on to add, "There's no question that there would be fewer wrongful convictions if there was a universal DNA databank." (CRG Staff, 2011) In 2007, Barry Scheck, the other co-founder of the Innocence Project, told the New York Times that "many of the people his organization had helped exonerate would have been freed much sooner, or would not have been convicted at all" if state databases included profiles from all convicted offenders.

Jennifer L. Doleac, *The Effects of DNA Databases on Crime*, at 10 n. 5 (Nov. 2011), *available at* http://stanford.edu/~jdoleac/Doleac_DNADatabases.pdf (last visited Sept. 6, 2012) (citations omitted). While Mr. Scheck's comments related directly to profiles of convicted offenders, expanding the databases to include persons arrested for felonies could only assist efforts to determine the truth. The compelling state interest in preventing rapes, solving murders and freeing the wrongfully imprisoned offsets any privacy interest in a simple swab of the cheek during the booking process.

III

POLICE SHOULD NOT BE BLOCKED FROM LAWFULLY OBTAINING THE MOST RELIABLE MEANS OF IDENTIFICATION

Irrational fears derived from science fiction fantasies should not be relied upon to deny law enforcement the "gold standard" of identification methods. The influence of such Hollywood created scenarios are clear in the case below, exemplified by a footnote referencing a John Travolta movie "Face Off' to explain that there may be cases where advanced face transplants require the police to obtain the face transplantee's DNA profile to ascertain his or her identity. *App.* at 69a n. 35.

The United States Military has adopted DNA technology as the most reliable means of identification. Every member of the United States military, from sailors to the Chairman of the Joint Chiefs of Staff, and every new recruit, is required to submit a DNA sample for the military database, also known as a Repository. This is done for two purposes, the identification of remains and for criminal investigations.

> The Department of Defense (DOD) began to use DNA samples to identify the remains of service members during the first Gulf War in 1991. "Because of problems with obtaining reliable DNA samples during the Gulf War, the DOD began a program to collect and store reference specimens of DNA from

members of the active duty and reserve forces." What was then called the "DOD DNA Registry," program within the Armed Forces Institute of pathology, was established pursuant to a December 16, 1991 memorandum of the Deputy Secretary of Defense. Under this program, DNA specimens are collected from active duty and reserve military personnel upon their enlistment, reenlistment, or preparation for operational deployment. As of December 2002, the Repository, now known as the "Armed Forces Repository of Specimen Samples for the Identification of Remains," contained the DNA of approximately 3.2 million service members. According to a recent DOD directive, the "provision of specimen samples by military members shall be mandatory." The direction to a soldier, sailor, airman, or marine to contribute a DNA sample is a lawful order which, if disobeyed, subjects the service member to prosecution under the Uniform Code of Military Justice (UCMJ). If convicted at court-martial for the offense of violating a lawful general order, the service member carries the lifelong stigma of a federal felony conviction, and faces a maximum punishment of a dishonorable discharge, confinement for two years, total forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. (10 § 1565a. DNA samples maintained for identification of human remains: use for

law enforcement purposes (a) Compliance with a court order).[4]

Patricia A. Ham, *An Army of Suspects: The History and Constitutionality of the U.S. Military's DNA Repository and Its Access for Law Enforcement Purposes*, 27-50-363 THE ARMY LAWYER – DEPARTMENT OF THE ARMY PAMPHLET 1, 1 (July/Aug. 2003), available at http://www.loc.gov/rr/frd/Military_Law/pdf/07-08-2003.pdf (last visited Sept. 6, 2012).

DNA technology has become so commonplace that for a fee, consumers wishing to trace their family tree now can provide their own buccal swabs for testing. *See*, GENETIC GENEALOGY, http://www.dnaancestryproject.com/ydna_intro_howto.php (last visited Sept. 6, 2012). Even pet owners can use buccal swabs to test their dog's DNA for breed ancestry. *See*, DOG-DNA, http://www.dog-dna.com/ (last visited Sept. 6 2012).

It is well-known that in the aftermath of disasters such as Hurricane Katrina, the 9-11 attacks and the Tsunami in Japan, DNA is widely used to identify the victims by comparing recovered remains to relatives' toothbrushes and personal effects. Bartha Maria Knoppers, *et al.*, *Ethical Issues in Secondary Uses of Human Biological Materials from Mass Disasters*, 34 J.L. MED. & ETHICS 352, 352). Such access, affordability and routine use of DNA tests have enhanced the reputation for accuracy and reliability of DNA testing. Its availability to the everyday consumer reduces, if not

---

4. In 2003, National Defense Authorization Act expanded the Repository uses to include criminal prosecutions.

completely eliminates, any sense of embarrassment or stigma attached to the swabbing of the cheek.

In 1932, Mortimer Kelly was arrested for selling gin and was fingerprinted. He complained that he suffered indignity at being fingerprinted. Judge Learned Hand wrote:

> Finger printing seems to be no more than an extension of methods of identification long used in dealing with persons under arrest for real or supposed violations of the criminal laws. It is known to be a very certain means devised by modern science to reach the desired end, and has become especially important in a time when increased population and vast aggregations of people in urban centers have rendered the notoriety of the individual in the community no longer a ready means of identification.

United States v. Kelly, 55 F.2d 67, 69 (2nd Cir. 1932).

Judge Hand went on to note that fingerprinting was becoming widespread in 1932.

> Finger printing is used in numerous branches of business and of civil service, and is not in itself a badge of crime. As a physical invasion it amounts to almost nothing, and as a humiliation it can never amount to as much as that caused by the publicity attending a sensational indictment to which innocent men may have to submit.

Id. at 70. The same can be said for the use of DNA today. The police could have adequately identified Mortimer with a photograph and he may have been well-known in his community. However, they did not have to reject a more accurate means of identification just because it was not necessary to identify Mortimer Kelly in 1932 with a new technological tool of fingerprints. Here too, as in 1932, DNA identification, should not be prohibited just because other methods of identification are available.

IV

DNA SAMPLING DURING BOOKING OF A FELONY ARRESTEE IS ANOTHER BIOMETRIC MEASURE OF IDENTITY TO BE INCLUDED IN A DATABASE

The DNA sampled from a swab of the cheek obtained during booking is merely another biometric identifier, like a booking photo, fingerprint, height or weight measurement, eye or hair color description, or a photograph of tattoos, that is collected as part of an arrestee's booking process.

> Biometrics involves the scanning or recording of some unique personal characteristic, such as a fingerprint, a retinal print or voice pattern and the comparison of the digitized image or recording against a verified database for positive identification. Digital imaging, the technology involved in

> finger imaging, is already a basic component of a myriad of applications ranging from document management to medical radiology to videoconferencing, and its contribution to the field of biometrics makes the current technology of finger imaging possible. In finger imaging, the technology converts a fingerprint into a highly detailed and exact electronic image that a computer can interpret and compare to other images.

James J. Killerlane III, *Finger Imaging: A 21st Century Solution to Welfare Fraud at our Fingertips*, 22 FORDHAM URB. L.J. 1327, 1333-34 (1994).

Other biometric identifiers, especially photographs and prints, have been incorporated for years into a collection or databases. These databases have been used for authenticating the identity of the person in custody and for intelligence in crime solving. When an unknown sample is recovered from a crime scene (fingerprint, hair, blood, video capture, etc.), that sample can be compared to known exemplars by sifting through available databases.

Booking photos were incorporated into "mug books" long before computers were available to digitize the photographs. In 1900, a defendant challenged the taking of his photograph upon arrest and inclusion of that photo in the "Sheriff's Rogues Gallery." *State ex rel. Bruns v. Clausmeier*, 154 Ind. 599, 57 N.E. 541 (1900). The Indiana Supreme Court refused to reject the use of a relatively new invention and held that the sheriff was acting within his lawful authority:

> It would seem, therefore, if, in the discretion of the sheriff, he should deem it necessary to the safe-keeping of a prisoner and to prevent his escape, or to enable him the more readily to retake the prisoner if he should escape, to take his photograph, and a measurement of his height, and ascertain his weight, name, residence, place of birth, occupation and the color of his eyes, hair, and beard, as was done in this case, he could lawfully do so.

Id. at 542.

Even booking photos from an illegal arrest were allowed to remain in the "database" or mug book and could result in a subsequent prosecution if that photograph was selected by another witness in an unrelated crime. *People v. McInnis*, 6 Cal. 3d 821, 825-26 (1972).

For years, fingerprints have been gathered to identify an arrested suspect. Courts have held that fingerprints taken at booking after a felony arrest that are later challenged as illegally seized can still be used to connect defendants to other offenses. *People v. Clark*, 30 Cal. App.3d 549, 558-59 (1973). An exception to this rule is found in a 'dragnet' case where all young African-American men were detained and printed in Meridian, Mississippi in a clearly illegal sweep conducted just to obtain fingerprints; there was no evidence that the young men who were detained were in lawful custody. *Davis v. Mississippi*, 394 U.S. 721, 727-28, 89 S. Ct. 1394, 1395, 22 L. Ed. 2d 676 (1969).[5]

---

5. This distinction was also later noted by the Supreme Court .

(continued...)

The Court below suggests DNA is impermissible because it is used solely for investigation, i.e., whether arrestees have committed other unsolved crimes. (*App.* 44a.) However, photo recognition software may allow the use of a booking photo of an identified arrestee to be compared to countless unknown faces represented in video captures of unsolved crimes. The ability to access the database of photographs for intelligence from past crimes does not bar the taking of the arrestee's photo at booking as an unconstitutional search.[6]

In California, it was not until the initiation of the California Identification System ("Cal ID") in 1985, that latent prints of an unknown suspect lifted from crime scenes could be compared to a collection of fingerprints.[7] CAL ID enables law enforcement to use a known exemplar from an arrestee and compare it to unsolved crimes. The technological leap that allowed searching a database with an arrestee's fingerprints in order to determine what, if any, other

---

(...continued)

> The respondent in this case, like *Davis*, was briefly detained at the station house. Yet here, there was, as three courts have found, probable cause to believe that the respondent had committed the murder. The vice of the detention in *Davis* is therefore absent in the case before us.

(*Cupp v Murphy* (1973) 412 U.S. 291, 294-295, 93 S. Ct. 2000, 36 L. Ed. 2d 900, 1973 U.S. LEXIS 63.)

6. The potential photo recognition software searching a DMV photo database was discussed as a potential example similar to DNA database searches in *People v. Johnson* (2006) 139 Cal.App.4th 1135, 1150-1151

[7] See Cal. Pen. Code sec. 11112.1 et. Seq.

offenses he or she committed, did not convert the rolling of the arrestee's fingerprints at booking into an unconstitutional search.

These biometric identifiers discussed above are all part of the need to identify the arrestee, which includes what he or she has done. The courts have traditionally recognized the need to ascertain the true identity of an arrestee, which is relevant not only to solving the current crime but to solve past and future crimes as well. *See supra*, pp. 6-7; *Jones v. Murray*, 962 F.2d at 306-07.

While not specifically recognizing what can be termed a "true identity" exception authorizing searches, the United States Supreme Court has recognized, in a plurality decision, the need for an inventory search, which may assist in ascertaining or verifying the arrestee's identity. *Illinois v. Lafayette*, 462 U.S. 640, 647, 103 S. Ct. 2605, 2608, 77 L. Ed. 2d 65 (1983). The "true identity" exception applies to DNA genotyping as much as it does to fingerprinting or photographs. All these biometric identifiers can be included in a database, accessible for intelligence as to other crimes, and should be covered under the true identity exception. "[T]he use of database searches as a means of identifying potential suspects is not new or novel." *Johnson,* 139 Cal.App.4th at 1149.

DNA identification is still the most reliable, immutable identifier that may take as few as two or as long as thirty days to compare to the database. As a biometric identifier, a DNA profile is one more method to establish who has been arrested for the felony. The Fourth Amendment did not create a constitutional straightjacket that allows two biometric identifiers (photos and fingerprints) but excludes the most reliable.

CONCLUSION

It would be a mistake to discard a scientifically proven minimally invasive technology which has the potential to save lives, protect potential victims, and free the wrongfully convicted due to fears of a futuristic imagined tyranny. The Constitution does not require our society to cower in fear of the future.

Respectfully submitted,

STEVE COOLEY
District Attorney of
Los Angeles County

By

IRENE WAKABAYASHI
Head Deputy District Attorney
Appellate Division

PHYLLIS ASAYAMA
Deputy District Attorney

ROBERTA SCHWARTZ
Deputy District Attorney (*Counsel of Record*)

Attorneys for Amicus Curiae in Support of Petitioner for Writ of Certiorari

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

SEP 17 2012
OFFICE OF THE CLERK

No. 12-207

IN THE

Supreme Court of the United States

STATE OF MARYLAND,

Petitioner,

v.

ALONZO JAY KING, JR.,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

BRIEF FOR AMICUS CURIAE DNA SAVES IN SUPPORT OF PETITIONER

JONATHAN S. FRANKLIN*
MARK EMERY
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0466
jfranklin@fulbright.com

* Counsel of Record

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

INTRODUCTION 3

ARGUMENT 4

I. ARRESTEE DNA IDENTIFICATION SOLVES AND PREVENTS CRIME, AND PROTECTS THE INNOCENT 4

II. ARRESTEES HAVE NO CONSTITUTIONAL RIGHT TO HIDE IDENTIFYING INFORMATION 10

A. Arrestees Have No Privacy Interests In Shielding Identifying Information, Whether Traditional Fingerprints Or DNA Profiles 10

B. The Limited Analysis Performed For DNA Identification Implicates No Broader Privacy Concerns 14

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

CASES:

Anderson v. *Commonwealth*, 274 Va. 469, 650 S.E.2d 702 (2007) 3

Green v. *Berge*, 354 F.3d 675 (7th Cir. 2004) 5

Haskell v. *Harris*, 669 F.3d 1049 (9th Cir.), *vacated on grant of reh'g en banc*, 686 F.3d 1121 (9th Cir. 2012) ..... *passim*

Jones v. *Murray*, 962 F.2d 302 (4th Cir. 1992) 10

King v. *State*, 425 Md. 550, 42 A.3d 549 (2012) 3, 10, 11, 14

Mario W. v. *Kaipio*, 230 Ariz. 122, 281 P.3d 476 (2012) 3, 10

Maryland v. *King*, No. 12A48, 2012 WL 3064878 (U.S. July 30, 2012) 5

People v. *Buza*, 197 Cal. App. 4th 1424 (2011), *review granted*, 132 Cal. Rptr. 3d 616, 262 P.3d 854 (2011) 4

Rakas v. *Illinois*, 439 U.S. 128 (1978) 17

Rise v. *Oregon*, 59 F.3d 1556 (9th Cir. 1995) 5

Samson v. *California*, 547 U.S. 843 (2006) 10

United States v. *Kincade*, 379 F.3d 813 (9th Cir. 2004) 15

United States v. *Mitchell*, 652 F.3d 387 (3d Cir. 2011) (en banc) 3, 4, 10, 16

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Pool*, 621 F.3d 1213 (9th Cir. 2010), *vacated as moot upon en banc review*, 659 F.3d 761 (9th Cir. 2011) 3

United States v. *Sczubelek*, 402 F.3d 175 (3d Cir. 2005) 5

RULE:

S. Ct. R. 37.2(a) 2

LEGISLATIVE MATERIALS:

151 Cong. Rec. S9528 (July 29, 2005) 7

155 Cong. Rec. S12905 (Dec. 10, 2009) 15

H.R. Rep. No. 106-900, pt. 1 (2000) 4, 15

OTHER AUTHORITIES:

Andrew Blankstein, *et al.*, *DNA Analysis Links Inmate to 12 Slayings*, L.A. Times, Oct. 23, 2004 ..... 7, 8

J.M. Chaiken *et al.*, *Varieties of Criminal Behavior* 44 (1982) 6

Chicago Study on Preventable Crimes 7

Laylan Copelin, *Texas Legislature Expands Use of DNA Testing*, Cox News Service (June 8, 2001) 7

Denver DA, *Denver's Study on Preventable Crimes* 7

A. Nicholas Groth, *et al.*, *Undetected Recidivism Among Rapists and Child Molesters*, 28 Crime & Delinquency 450 (1982) 6

TABLE OF AUTHORITIES—Continued

Page(s)

James E. Hooper, *Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act*, 89 Mich. L. Rev. 1951 (1991) 6

Man Who Killed 11-Year-Old Girl Sentenced to 59 Years in Prison (Nov. 22, 2011) 9

Maryland Criminal Justice Info. Sys., *Maryland Study on Preventable Crimes* 7

Joan Petersilia, *When Prisoners Come Home* (2003) 6

John K. Roman, *et al.*, *The DNA Field Experiment: Cost-Effectiveness Analysis of the Use of DNA in the Investigation of High-Volume Crimes* 13 (Urban Inst. Justice Pol'y Ctr. 2008) 6

State of Virginia, Dep't of Forensic Science, *DNA Databank Statistics* 5

U.S. Dep't of Justice, Bureau of Justice Statistics, *Violent Felons In Large Urban Counties* (2006) 6

Webster's Third New International Dictionary (2002) 12

IN THE

Supreme Court of the United States

No. 12-207

STATE OF MARYLAND,

Petitioner,

v.

ALONZO JAY KING,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

BRIEF FOR AMICUS CURIAE DNA SAVES IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

DNA Saves is a 501(c)(4) non-profit association that educates policy-makers and the public about the value of forensic DNA.[1] DNA Saves was formed by

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The following persons made such a monetary contribution: Lisa Adair, Mike Antiporda, BES Rental & Sales, Jesus Becarra, Francis Beeman, Deborah Benjamin, John Benjamin, Dale Bowman II, Dan Boyd, Joe Brininstool, Cathrynn Novich Brown, Greg Brown, Carole Bryant, Charles Burton, Terry Burton, Marinda Calderon, John Caraway, Suzanne Carlsen, Staci Carrell, Tricia Chace, Carol Chelkowski, Cielo Vista Apartments, Mike Cleary, T. Arlene Cooper, Danny Cross, Mike Currier, Linnie Davis, Samuel Denman, Christy Dickerson, Tommy and Sheryl Dugger, Kathy Elmore, Diane Esquibel,

Jayann and David Sepich in late 2008, marking the five year anniversary of the vicious murder of their daughter, Katie. Had a DNA sample been taken from Katie's murderer, Gabriel Avilla, upon arrest for an unrelated crime, the Sepichs would have discovered who killed their daughter only three months after her death. Instead, Avilla remained free for over three years to victimize more daughters, while the Sepichs waited for answers. The Sepichs hope that by advocating for better DNA testing laws they can prevent other parents from asking "why?"

DNA Saves is committed to working with every state and the federal government to pass laws allowing DNA to be taken upon arrest, and to provide meaningful funding for DNA programs. In January

---

Laura Florez, Jeffrey Foote, Jeri Forsha, David Fritschy, Myrtle Fritschy, Patty Fugate, Danielle Galloway, Deanna Garringer, Mike Garringer, Jeanne Hall, Chad Hewitt, Todd Hyden, Matthew John, Chris Jones, Kathy M. Jones, Davis W. Kayser, Erin Kennedy, Debra Kimbley, Cindy Klein, Jeff Knox, Jody Knox, Gary Lanier, Jan Lemons, Janice Leons, Life Technologies, Matt Leroch, Tracy Leroch, Rita London, Sam Mendez, Gabriel Lujan, Carlsbad Mall, Charles and Phyllis McEndree, Justin McGeath, Rebecca McIntyre, Nessa Meadows, Larry Mitchell, Lila Mohesky-Roybal, Robert Murray, S. Narajaman, Juanita Otero, PR Consultants, Inc., Pat Patterson, Terishala Patel, Sandy Pierson, Michael Potter, John Richter, Sepco, Inc., Resource Management, Dave & Kim Rogers, Shauna Rodgers, Alvaro Ruiz, Robert Schumacher, Jeffrey Schwartz, Dave and Jayann Sepich, Mike and Karen Sepich, Roger and Cindy Short, Service Solutions, Kassie Simmons, Craig Stephens, Sheri Stephens, Brenda Suggs, Natosha Temple, Paul Trone, Dustin Walker, Judi Waters, Janelle Whitlock, Richard Wilkinson, Sharon A. Williams, Connie Wilson, James Wood, and Bob and Caroline Yeager.

Pursuant to S. Ct. R. 37.2(a), counsel of record for petitioner and respondent received timely notice of the intent to file this brief, and the parties have consented to the filing of this brief.

2007, New Mexico implemented "Katie's Law," which requires DNA profiles for most felony arrestees to be included in the federal database known as CODIS. New Mexico's program has already registered at least 344 matches of unsolved crimes to 307 individual arrestee DNA profiles. Twenty-five of those matches identified suspects in unsolved murders, and 50 identified suspects in unsolved sex-related crimes. The very first arrestee sample was matched to a double homicide case, leading to a conviction.

DNA Saves is also vitally committed to ensuring that courts correctly apply the Constitution and allow legislatures to enact these sensible and effective laws, and has filed amicus briefs supporting that result in several other cases raising the same issue as this case. The resolution of this issue will have a direct and profound effect on DNA Saves' efforts to expand the use of DNA identification of arrestees throughout the country so that more recidivist crime can be prevented.

INTRODUCTION

As the petition explains, there is a direct and irreconcilable split among the lower courts on the constitutionality of DNA identification of arrestees. *Compare United States* v. *Mitchell*, 652 F.3d 387 (3d Cir. 2011) (en banc) *and Anderson* v. *Commonwealth*, 274 Va. 469, 650 S.E.2d 702 (2007) (finding no Fourth Amendment violation) *with King* v. *State*, 425 Md. 550, 42 A.3d 549 (2012) *and Mario W.* v. *Kaipio*, 230 Ariz. 122, 281 P.3d 476 (2012) (finding Fourth Amendment violation).[2]

---

[2] *Compare also Haskell* v. *Harris*, 669 F.3d 1049, 1065 (9th Cir.), *vacated upon grant of reh'g en banc*, 686 F.3d 1121 (9th Cir. 2012) and *United States* v. *Pool*, 621 F.3d 1213 (9th Cir.

DNA Saves files this brief to further amplify why the issue is of overriding importance to the thousands of potential victims whose names will never be known but who could be saved from death or serious harm through this simple but powerful identification technology. This brief also points out some of the critical legal errors made by the court below. The Court should grant certiorari to correct those errors and hold that no arrestee has a constitutional right to hide his identity so that nobody can know what crimes he has committed or may commit in the future.

ARGUMENT

I. ARRESTEE DNA IDENTIFICATION SOLVES AND PREVENTS CRIME, AND PROTECTS THE INNOCENT.

Law enforcement has long identified arrestees by their fingerprints, which are routinely matched to crime scene evidence to solve crimes. A DNA profile of the sort collected in this case is no different: it "is used solely as an accurate, unique, identifying marker—in other words, as fingerprints for the twenty-first century." *Mitchell*, 652 F.3d at 410. DNA identification is "one of the most important advances in criminal identification methods in decades." H.R. Rep. No. 106-900, pt. 1, at 9 (2000). "The information derived from [DNA] is substantially the same as that derived from fingerprinting—an identifying marker unique to the individual from whom the information is derived."

2010), *vacated as moot upon en banc review*, 659 F.3d 761 (9th Cir. 2011) (finding no Fourth Amendment violation) *with People* v. *Buza*, 197 Cal. App. 4th 1424 (2011), *review granted*, 132 Cal. Rptr. 3d 616, 262 P.3d 854 (2011).

Rise v. *Oregon*, 59 F.3d 1556, 1559 (9th Cir. 1995). But "DNA is a further—and in fact a more reliable—means of identification" than fingerprints. *United States* v. *Sczubelek*, 402 F.3d 175, 184 (3d Cir. 2005). *See also Green* v. *Berge*, 354 F.3d 675, 679 (7th Cir. 2004) ("DNA is the most reliable evidence of identification—stronger even than fingerprints or photographs."). DNA profiling is now the gold standard of identification techniques. Physical and facial appearances can be changed, driver's licenses forged, and fingerprints concealed during crimes. But everyone leaves their DNA everywhere they go.

As Chief Justice Roberts recognized in granting a stay in this case, arrestee DNA identification "provides a valuable tool for investigating unsolved crimes and thereby helping to remove violent offenders from the general population. Crimes for which DNA evidence is implicated tend to be serious, and serious crimes cause serious injuries." *Maryland* v. *King*, No. 12A48, 2012 WL 3064878, at *2. (U.S. July 30, 2012). Virginia, which began arrestee DNA testing in 2003, shows how arrestee profiles can assist in solving and preventing crime. As of July 31, 2012, there were 352,888 DNA profiles in the state database, resulting in 8,184 hits. *See* State of Virginia, Dep't of Forensic Science, *DNA Databank Statistics* (www.dfs.virginia.gov/statistics/index.cfm). These hits assisted 7,978 investigations, including 599 murders and over 1,100 sex crimes. *Id.* Of these hits, 755 were obtained from the Arrestee Database, with 115 of those associated with sexual assault cases. *Id.*

Arrestee DNA can catch repeat offenders before they strike again. Seventy percent of America's crime is committed by only six percent of its

criminals. *See* James E. Hooper, *Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act*, 89 Mich. L. Rev. 1951, 1951 n.3 (1991). From 1990-2002, 56% of violent offenders had prior convictions. U.S. Dep't of Justice, Bureau of Justice Statistics, *Violent Felons In Large Urban Counties* 1 (2006) (bjs.ojp.usdoj.gov/content/pub/pdf/vfluc.pdf).) And this does not include the many crimes that are never resolved. Studies show that for every burglary conviction obtained through DNA matches, 7.4 additional crimes are avoided. John K. Roman, *et al.*, *The DNA Field Experiment: Cost-Effectiveness Analysis of the Use of DNA in the Investigation of High-Volume Crimes* 13 (Urban Inst. Justice Pol'y Ctr. 2008). Some serial burglars are individually responsible for more than 200 crimes a year. J.M. Chaiken *et al.*, *Varieties of Criminal Behavior* 44 (1982). Sexual assault offenders commit an average of eight sexual assaults for every one detected. A. Nicholas Groth, *et al.*, *Undetected Recidivism Among Rapists and Child Molesters*, 28 Crime & Delinquency 450-458 (1982).

Moreover, arrestees are far more likely than the general public to be recidivists. Approximately 77% of arrestees have prior arrests, 69% have multiple prior arrests and 61% have at least one prior felony conviction. *See Felony Defendants in Large Urban Counties*, *supra* at 4, 5. By contrast, only about 6.5% of the U.S. population has ever had a felony conviction. *See* Joan Petersilia, *When Prisoners Come Home* 215 (2003) (data as of 2002).

These general statistics are borne out by individual case profiles. In 1987, Chester Turner was arrested for assault in California, but freed due to lack of evidence. At that time, California law did not

require that his DNA profile be taken on arrest. Turner continued to terrorize a Los Angeles community and was arrested nineteen more times before being convicted of rape in 2002. *See Haskell*, 669 F.3d at 1065. Only then was his DNA profile taken, and it matched evidence found on twelve rape and murder victims, the first murdered only two months after his 1987 arrest. *See* Andrew Blankstein, *et al.*, *DNA Analysis Links Inmate to 12 Slayings*, L.A. Times, Oct. 23, 2004, at A1; *see also* 151 Cong. Rec. S9528 (July 29, 2005) (Sen. Kyl). Those crimes could have been prevented had Turner's DNA profile been taken upon his initial arrest, rather than only after a conviction. See *Haskell*, 669 F.3d at 1065.

In Texas, Christopher Dye raped three women before being arrested in 1993 for burglary. Unaware he was a serial rapist, authorities released him on bail. Over the next six months, Dye raped four more women before being arrested for burglary. After two months in jail, he raped seven more women before finally being caught. Testing Dye upon his first burglary arrest could have led to a DNA match from his first three crimes, and prevented eleven others. *See* Laylan Copelin, *Texas Legislature Expands Use of DNA Testing*, Cox News Service (June 8, 2001).[3]

---

[3] *See also Chicago Study on Preventable Crimes* (www.dnaresource.com/documents/ChicagoPreventableCrimes-Final.pdf); Maryland Criminal Justice Info. Sys., *Maryland Study on Preventable Crimes* (www.denverda.org/DNA_Documents/MarylandDNAarresteestudy.pdf); Denver DA, *Denver's Study on Preventable Crimes* (www.denverda.org/DNA_Documents/Arrestee_Database/Denver%20Preventable%20Crime%20Study1.pdf) (studies from Illinois, Maryland and Colorado on repeat offenders identifiable by earlier DNA testing).

In California, "[l]aw enforcement officials already have used California's expanded database to solve numerous past crimes." *Haskell*, 669 F.3d at 1064. Only ten months after California's arrestee DNA identification law took effect, felony arrestee DNA samples had aided California police in 291 investigations. *Id.* For example, a man arrested for drug possession in 2009 was identified as the person who had murdered an 80-year-old woman 20 years earlier. *Id.* And another man arrested for assault in 2009 was identified as the perpetrator of a sexual assault and robbery only six months earlier. *Id.*

Mr. King's case vividly demonstrates not only the substantial public safety benefits of arrestee DNA identification but also the serious adverse consequences of invalidating this new technological advance. Mr. King was arrested in 2009 for assault and identified as the man who had viciously raped a 53-year-old woman at gunpoint six years earlier after breaking into her house. He had discarded his DNA at the earlier crime scene (through his semen), and the DNA profile obtained after his later arrest for the unrelated assault confirmed his identity. Yet the Maryland Court of Appeals reversed his rape conviction, thereby letting a proven recidivist back onto the street to potentially victimize other women.

Moreover, DNA identification upon arrest not only catches the guilty, but can exonerate the innocent. The Chester Turner story is made even worse by the fact that another man, a mentally disabled janitor named David Jones, was wrongfully convicted of three of Turner's murders based on blood-typing evidence and served eleven years in prison for crimes he did not commit. *See id* at 1065; Blankstein, *supra*. Had Turner's DNA been sampled upon his

first arrest, this wrongful conviction likely never would have occurred. *See Haskell*, 603 F.3d at 1065 ("Had the 2004 Amendment been in effect in 1995, it is likely that Jones never would have been imprisoned because police would have had access to Turner's DNA profile."). Likewise, an arrestee DNA match obtained under Katie's Law both solved the murder of an 11-year-old New Mexico girl and exonerated a mentally challenged man who had wrongfully confessed to the crime and was jailed for two years. *See Man Who Killed 11-Year-Old Girl Sentenced to 59 Years in Prison* (Nov. 22, 2011) (www.kob.com/article/stories/S2383395.shtml).

DNA identification also helps reduce invasions of privacy resulting from inefficiency, inaccuracy or bias in law enforcement. Through this powerful technology, prosecutions are not left to the memory of witnesses or the discretion of law enforcement officers and police are led immediately to the right suspect, reducing the need for intrusive investigations of the innocent and eliminating racial profiling or other biases that might otherwise creep into investigations. Moreover, unlike fingerprints, DNA profiles are stored as numeric files without any personal information or criminal background.

As Chief Justice Roberts recognized in issuing a stay, the decision below threatens serious harm to the public if not reversed. Simply put, if DNA testing of arrestees is prohibited, innocent people will die who would otherwise be saved, and preventable harm will befall many others. We will never know the exact number, but if even a single life is lost by not allowing law enforcement to employ this simple tool to identify recidivists before they strike again, that is one life too many. If there were

real privacy interests at stake, perhaps these dire consequences would have to be tolerated. But as next shown, there are no such interests. Just as with traditional fingerprinting and other forms of identification, no arrestee has a protected interest in concealing his identity so that nobody can ever link him to crime scene evidence.

II. ARRESTEES HAVE NO CONSTITUTIONAL RIGHT TO HIDE IDENTIFYING INFORMATION.

As the lower courts have recognized, whether DNA identification of arrestees is "reasonable" under the Fourth Amendment is decided under a totality of the circumstances test, taken from this Court's precedents, that balances the government's interests against any intrusion on the arrestee's legitimate privacy interests. *See, e.g.*, *Samson* v. *California*, 547 U.S. 843, 848 (2006); *King*, 425 Md. at 561; *Mario W.*, 285 P.3d at 481; *Haskell*, 669 F.3d at 1053-54; *Mitchell*, 652 F.3d at 403. In applying that test, however, the court below overvalued the interests of arrestees and undervalued those of law enforcement and the potential victims of recidivist criminals.

A. Arrestees Have No Privacy Interests In Shielding Identifying Information, Whether Traditional Fingerprints Or DNA Profiles.

Arrestees, who have lawfully been detained upon an officer's finding of probable cause that they have committed crimes, have lesser privacy interests than the general public and those privacy interests do not include shielding their identifying information. *See, e.g.*, *Mitchell*, 652 F.3d at 412; *Jones* v. *Murray*, 962

F.2d 302, 306 (4th Cir. 1992) ("when a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it"). As explained in the petition, DNA profiling reveals only identifying information: thirteen otherwise meaningless markers that were deliberately chosen because they have no known correlation with any physical traits. *See* Pet. 15-17.

In allowing arrestees to shield that information, the court below adopted a mistaken understanding of what it means to "identify" someone. In its view, the government's legitimate interest in knowing an arrestee's identity is limited to knowing that person's name. Thus, if the State can discern an arrestee's name through other means, such as traditional fingerprinting, it has no need to employ DNA identification and the Fourth Amendment prohibits it from doing so. The court invalidated Maryland's law because the State had "no evidence that it had any problems whatsoever identifying accurately King through traditional booking routines." 425 Md. at 599. King had not "presented false identification when arrested or had altered his fingerprints or appearance in any way that might increase the State's legitimate interest in requiring an additional form of identification to be certain who it had arrested," and the court refused to allow DNA identification "without a showing that accurate identification was not possible using 'traditional' methods." *Id.* at 599, 600 And because the court believed the government's interest stops at learning a person's name, law enforcement has no ability to use DNA profiling for "investigative" purposes such as matching it to crime scene evidence. *Id.* at 601

("the State may secure the use of DNA samples, without a warrant under the Act, as a means to identify an arrestee, but not for investigatory purposes").

That reasoning is flawed. Identification means more than just knowing a person's name. "Identity" is simply "'the condition of being the same with something described, claimed, or asserted * * *.'" *Haskell*, 669 F.3d at 1063 (quoting Webster's Third New International Dictionary 1123 (2002)). Names are one kind of identifying information, but they are far from the only kind. Fingerprints are another kind: they verify that an arrestee is the person with a particular set of unique fingerprints. Thus, the government always takes fingerprints from arrestees even when it already knows their names through other means. Indeed, fingerprinting does not reveal a name; at most, it associates a name learned through other means if a person was ever fingerprinted before. Fingerprinting is instead used largely to ascertain if identifying information is connected with other records, and the fingerprint record is placed in a database to enable future comparisons. This process invades no legitimate privacy interests because only identifying information is obtained, which no arrestee ever has a legitimate right to conceal, regardless of whether the government already has other such information.

The analysis is no different with DNA identification. "The collection and use of DNA for identification purposes is substantially identical to a law enforcement officer obtaining an arrestee's fingerprints to determine whether he is implicated in another crime." *Haskell*, 669 F.3d at 1063 (citation omitted). Traditional fingerprinting identifies a person by a

particular set of lines on his fingers. Photography identifies a person by a particular set of facial characteristics. Production of a driver's license identifies a person by the license information. Likewise, DNA profiling identifies a person by a particular set of otherwise meaningless DNA markers. The markers themselves ***are*** the person's identity, just as much as a name and birthday or other physical characteristics like facial features and fingerprints. This serves the same purposes as regular fingerprint identification. The only difference is that DNA identification can often do the job better. This case is a good example. Mr. King wore a mask during the rape and there was no fingerprint evidence. But he left his DNA, which could not be concealed.

If accepted, the flawed dichotomy between identification and investigative uses of identifying information would drastically disrupt law enforcement and endanger public safety. DNA profiles are used for investigatory purposes. But so are fingerprints and other forms of identification. If the reasoning of the court below were correct, "our entire criminal justice system would be upended." *Id.* at 1061. The entire system of fingerprinting would be invalid, because law enforcement could not require an arrestee to submit to fingerprinting if the records were ever to be used to link the person to a prior crime. *See id.* (if DNA profiles and fingerprint records "may only be used in connection with the crime for which probable cause was found," law enforcement "would be prevented from using basic investigative tools" and "could never be allowed to match crime scene fingerprints to data-bases of prints collected from past arrestees").

No arrestees ever have a legitimate interest in withholding their identifying information, whether fingerprints, names, birth dates, photographs or DNA profiles. Once that information is provided, it can be—and routinely is—used for other legitimate governmental interests, most notably to link the person to a prior crime. The actual evidence of criminal activity is not the subject of any search; it was voluntarily left by the perpetrator at the crime scene in the form of fingerprints or discarded bodily fluids. The fingerprint or DNA profile obtained upon the earlier or later arrest is simply used to identify the arrestee as that perpetrator. The government has a compelling interest in making that identification and thereby protecting the public from criminal activity.

B. The Limited Analysis Performed For DNA Identification Implicates No Broader Privacy Concerns.

Even though the only information ever obtained or used in DNA identification is the thirteen so-called "junk" markers, the court below held that an arrestee "ha[s] an expectation of privacy to be free from warrantless searches of his biological material and all of the information contained within that material" and that "we can not turn a blind eye to the vast genetic treasure map that remains in the DNA sample retained by the State." *King*, 425 Md. at 595-96. That reasoning cannot withstand scrutiny.

There are stringent criminal penalties, in Maryland and elsewhere, prohibiting anyone from obtaining or using any genetic information of an arrestee beyond the identifying markers. *See* Pet. 16. And even though the FBI has been analyzing DNA

for over twenty years, "there has never been one noted case in which a lab employee has ever made an unauthorized disclosure of DNA information." 155 Cong. Rec. S12905 (Dec. 10, 2009) (remarks of Sen. Kyl). As the Ninth Circuit has explained, legal decisions in this area cannot be based on "dramatic Hollywood fantasies" rather than "concretely particularized facts developed in the cauldron of the adversary process and reduced to an assessable record." *United States* v. *Kincade*, 379 F.3d 813, 837-38 (9th Cir. 2004). *Accord Haskell*, 669 F.3d at 1062. Thus, if and when "some future program permits the parade of horribles the DNA Act's opponents fear—unregulated disclosure of CODIS profiles to private parties, genetic discrimination, state-sponsored eugenics, * * * we have every confidence that courts will respond appropriately." *Id.*

But it is also important to understand just how far-fetched these fantasies really are. The only information stored in CODIS consists of the thirteen junk markers, which are not associated with a name. *Kincade*, 379 F.3d at 818-19; H.R. Rep. No. 106-900, pt. 1 at 27. Thus, even if someone illegally gained access to CODIS, the only way to learn any genetic information about a specific arrestee would be to risk criminal penalties by (1) finding out where that person was arrested; (2) conspiring with the arresting agency to gain access to the physical sample taken at arrest; and (3) surreptitiously performing additional laboratory tests on that sample to generate additional data. There is no apparent reason why anyone would be motivated to obtain such information in the first place. And it is entirely unreasonable to think that someone would risk criminal sanctions to carry out such an elaborate plot,

which would be revealed as soon as the information were used. If someone truly had a nefarious reason to learn a person's genetic information, it would be far easier to test a strand of hair or another discarded sample.

It is irrelevant that the arresting agency retains the physical sample, which hypothetically could be re-analyzed to extract information beyond the identifying markers. Because the physical inconvenience of a buccal swab is *de minimis*, the only relevant "search" that even potentially implicates legitimate privacy interests is the analysis of the information contained in the sample obtained. *Cf. Mitchell*, 652 F.3d at 406 (holding that DNA identification "entails two separate searches": the physical collection of the sample and the analysis of the information). That search is plainly reasonable because the sample is analyzed only to determine the thirteen markers that are used and useful only for identification. If, hypothetically, the government were to perform yet another analysis to discover additional information that it does not yet have, additional privacy concerns might be implicated by that analysis. But such actions are strictly prohibited under pain of criminal penalty, have never occurred in this or any other case, and can be addressed on their own facts if they ever do occur. The government's continued retention of the sample is thus irrelevant where that access has yielded nothing other than purely identifying information.

Just as with fingerprints, DNA identification is ***not*** a search of private information for evidence of a crime. The physical evidence against which the comparison is made is not obtained through any new search but rather was abandoned at a crime scene,

and an arrestee has no legitimate interest in concealing that he is the person who has those identifying characteristics. No one can assert a Fourth Amendment right to the privacy of his criminal endeavors. *See Rakas* v. *Illinois*, 439 U.S. 128, 143-44 n.12 (1978) ("a 'legitimate' expectation of privacy, by definition, means more than a subjective expectation of not being discovered"). As with fingerprints, photographs, handwriting samples, and other forms of identification, using DNA identification to link a person with another event does not involve or justify any additional, more intrusive searches for evidence of wrongdoing.

It is therefore irrelevant whether the government offers released individuals a way to expunge their DNA records, or how easy any such process is. *Cf. King*, 435 Md. at 597 ("The expungement provisions of the Act recognize the importance of a conviction in altering the scope and reasonableness of the expectation of privacy."). Although Maryland offers a relatively simple expungement procedure, that mechanism is immaterial to the constitutionality of DNA identification. Just as there is no constitutional right to expungement of fingerprint records lawfully obtained, there is no constitutional right to expungement of DNA profiles. Once identifying information is lawfully obtained, the Constitution does not place further restrictions on the government's legitimate use of that information. The fact that Maryland, by providing an expungement procedure, has been ***more*** generous to arrestees than the Constitution requires casts no doubt on the validity of the initial collection of identifying information.

The Court should therefore grant certiorari and confirm that law enforcement can utilize this

effective identification technique. Future victims and their loved ones should not have to suffer and grieve because recidivist arrestees like Mr. King want to hide their identities. Arrestees' illegitimate interest in withholding their identifying information pales in comparison with the vital interests of these countless unknown future victims.

CONCLUSION

For the foregoing reasons and those in the petition, the petition should be granted and the judgment below reversed.

Respectfully submitted,

JONATHAN S. FRANKLIN*
MARK EMERY
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0466
jfranklin@fulbright.com

* Counsel of Record

Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

No. 12-207

In the Supreme Court of the United States

STATE OF MARYLAND,

Petitioner,

v.

ALONZO J. KING, JR.,

Respondent.

On Petition for Writ of Certiorari to the Maryland Court of Appeals

BRIEF OF MARYLAND CHIEFS OF POLICE ASSOCIATION, INC., MARYLAND SHERIFFS' ASSOCIATION, INC., AND POLICE CHIEFS' ASSOCIATION OF PRINCE GEORGE'S COUNTY, MARYLAND, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

KAREN J. KRUGER
Counsel of Record
Funk & Bolton, P.A.
Twelfth Floor
36 South Charles Street
Baltimore, MD 21201
410.659.7700
kkruger@fblaw.com
Counsel for Amici Curiae

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 3

CONCLUSION 15

APPENDIX A-1

TABLE OF AUTHORITIES

CASES **Page(s)**

Bell v. Wolfish, 441 U.S. 520 (1979) 7

Chimel v. California, 395 U.S. 752 (1969) 5

DA's Office v. Osburne, 557 U.S. 52 (2009) 9

Florence v. Board of Chosen Freeholders of the County of Burlington, ___ U.S. ___, 132 S. Ct. 1510 (2012) 6

King v. State, 425 Md. 550 (2012) 12

Schmerber v. California, 384 U.S. 757 (1966) 9, 10

United States v. Mitchell, 652 F.3d 387 (3d Cir. 2011) 8

STATUTES AND REGULATIONS

Fla. Stat. Ann. § 943.325(1)(a) (2012) 10

Md. Code Ann. § 2-511 (West Supp. 2011) 5

Md. Code Ann., Cts. & Jud. Proc., § 2-607 (2011) 7

LAW REVIEW ARTICLES

John D. Biancamano, Note, *The Evolving Nature of DNA Collection Statutes and their Fourth Amendment Justifications*, 70 Ohio St. L.J. 619 (2009) 10

D.H. Kaye, *The Constitutionality of DNA Sampling On Arrest*, 10 Cornell J.L. & Pub. Pol'y 455 (2001) 5

Kevin Lapp & Joy Radice, *A Better Balancing: Reconsidering Pre-Conviction DNA Extraction from Federal Arrestees*, 90 N.C. L. Rev. 157A (2012) 8

Derek Regensburger, *DNA Databases and the Fourth Amendment: The Time Has Come to Reexamine the Special Needs Exception to the Warrant Requirement and the Primary Purpose Test*, 19 Alb. L.J. Sci. & Tech. 319 (2009) 11

INTERNET RESOURCES

DNA Statistics, Governor's Office of Crime Control & Prevention, http://www.goccp.maryland.gov/dna/statistics.php (last updated July 26, 2012) 6

News, Events & Press Releases, Governor's Office of Crime Control & Prevention, http://www.goccp.maryland.gov/dna/news.php (last visited Aug. 22, 2012) 12, 14

NEWSPAPERS AND PERIODICALS

Walter A. McNeil, *President's Message: Our Recommitment to Addressing Wrongful Convictions*, The Police Chief, June 2012 13

Dan Morse, *After 15 Years in Prison, Montgomery Man is Cleared of Murder*, Wash. Post, Oct. 31, 2010 14

Michael D. Ranalli, *Wrongful Convictions and Officer Safety: Shifting the Focus to the Process*, The Police Chief, Jan. 2012 13

Yvonne Wenger, *DNA Call Could Undo Rape Case*, Baltimore Sun, June 10, 2012 12

Matt Zapotosky, *DNA Results Exonerate Two Teens in Rape Case*, Wash. Post, June 30, 2012 12

INTEREST OF THE *AMICI CURIAE*[1]

The Maryland Chiefs of Police Association, Inc. ("MCPA"), Maryland Sheriffs' Association ("MSA"), and Police Chiefs' Association of Prince George's County (Maryland) ("PCAPG") write in support of the Petitioner, State of Maryland, and in support of its Petition for Certiorari.

These *amici* are professional associations with a membership of more than 350 chiefs of police, sheriffs, other law enforcement members, directors of private security entities, and interested parties in related professions. Within their collective membership, most of the 130 law enforcement agencies in Maryland are represented. The MSA also represents the State's elected sheriffs who, in addition to standard law enforcement services, are also responsible for maintaining county detention centers and correctional facilities.

These associations serve law enforcement management and front line officers alike by providing opportunities for training, networking, strategic planning, and mutual support to better serve and protect the citizens of Maryland.

---

[1] The parties have consented to the filing of this brief and letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Amici intend to address the Court on behalf of the law enforcement community and urge that Maryland's petition be granted. The collection of DNA from citizens who have been arrested for certain enumerated crimes is a critical and effective modern tool that assists law enforcement in solving crimes, identifying perpetrators, and eliminating errors. These law enforcement goals constitute a vital State interest that the Maryland Court of Appeals failed to adequately recognize.

Amici are in a position to assist the Court in this case because the outcome of the case will affect not only all law enforcement agencies in Maryland, but also across the country; its import will not be limited to the parties to this case. *Amici* represent a large segment of the Maryland law enforcement population and are representative of the national law enforcement landscape.

INTRODUCTION AND SUMMARY OF ARGUMENT

Each law enforcement officer, from those on the front line to chiefs of police, takes an oath to uphold the United States Constitution and the constitution and laws of the various states. In support of this oath and to serve the public safety needs of their communities, officers are tasked with conducting investigations that have a dual goal: to exonerate the innocent and to arrest the guilty. DNA evidence makes a substantial contribution toward achieving this dual goal.

Moreover, public safety agencies and correctional facilities have a strong interest in obtaining the true identity of those in custody for safety and management purposes. In Maryland, pretrial detainees and arrestees may be held in local correctional facilities for up to several months before trial, and proper management of these persons requires firm identification of who they are and what backgrounds they have.

The prompt identification of arrestees allows law enforcement to narrow the focus of criminal investigations and effectively solve cases, new and old, more quickly. DNA collection and testing supports this efficiency of process, protects innocent citizens, and shields officers from potential civil liability for wrongful arrests.

ARGUMENT

This case, as outlined in the State of Maryland's Petition for Certiorari, presents an ideal opportunity for the Court to address and resolve the issue of the constitutionality of the collection of DNA evidence from people who have been arrested but not yet convicted. Approximately twenty-six other states have enacted or are considering DNA collection legislation similar to Maryland's, and lower courts are divided as to the constitutionality of these procedures. These courts and legislative bodies need the guidance of this Court to resolve this confusion; the Court must address the issue, sooner rather than later.

The law enforcement community strongly supports the collection and use of DNA evidence to service multiple legitimate public safety goals. These goals far overshadow the intrusion into a citizen's privacy interest required to obtain DNA evidence. The Court should grant the Petition in order to reverse the Maryland Court of Appeals and establish that this identification and investigative process is a reasonable search under the Fourth Amendment, and thus constitutional.

By granting the Petition, this Court can correct the error of the Maryland Court of Appeals, establish that the Maryland DNA collection statute is constitutional, and set guidelines for other legislatures, law enforcement entities, and courts.

While the *amici* support and agree with all of the arguments put forth by Maryland, this brief calls the Court's attention to the substantial State law enforcement and correctional interests that the court below failed to recognize. Once recognized, these interests clearly outweigh any privacy interest held by persons who are arrested and subjected to a minimally invasive search.

1. *The Court should grant the Petition in order to establish that the "search incident to arrest" exception to the warrant requirement applies to the taking of DNA samples from those arrested.*

In reviewing this case, the Court will have the opportunity to establish that the "search incident to

arrest" exception to the warrant requirement that originated with *Chimel v. California*, 395 U.S. 752 (1969) applies to the relatively non-intrusive collection of "personally identifying markers[2] that can generate a list of probable perpetrators of serious crimes." D.H. Kaye, *The Constitutionality of DNA Sampling On Arrest*, 10 Cornell J.L. & Pub. Pol'y 455, 508 (2001).

If, on the other hand, the Court were to require law enforcement officers to obtain warrants before taking DNA samples, even if only for those relating to offenses other than the one that triggered arrest, it would defeat the very purpose of DNA databases, which are an intelligence tool as much as they are a device for linking a known suspect with a known offense. *Id.* at 501. The risk of officers making pretextual arrests intended to secure a DNA profile is already statutorily limited because evidence resulting from a match in the database is subject to exclusion if there was no probable cause to arrest in the first instance. *Id.* *See also* Md. Code Ann., Pub. Safety § 2-511 (West Supp. 2011). Requiring a warrant adds no protection for the arrestee, but significantly limits law enforcement's ability to fully utilize the DNA process established by the state legislature.

---

[2] The DNA technology developed and in use in Maryland identifies individuals by a sequence of 13 hyper-variable DNA loci values that are comparable to unique fingerprint identification features in that they reveal no personal information about the suspect, but provide an identification unique to the individual.

Moreover, the "true identity" exception to the warrant requirement that pertains to fingerprinting should also apply to DNA genotyping. *See* Petition at 18-19, 21-23.

This DNA identification procedure has yielded significant public safety results since the enactment of Maryland's DNA arrestee law. Between January 1, 2009, and July 26, 2012, DNA comparisons of samples taken from arrestees created 193 "hits" and lead to 69 arrests of serious offenders. *DNA Statistics*, Governor's Office of Crime Control & Prevention, http://www.goccp.maryland.gov/dna/statistics.php (last updated July 26, 2012). The identification of these criminals was only possible because State law allowed for the taking of the initial sample upon arrest.

2. *The Court should grant the Petition in recognition of the challenges faced by correctional officials in maintaining safety and security in institutions.*

Detention facilities such as those operated by Maryland sheriffs and local correctional officials have a strong interest in identifying those held in their custody, even those held for a limited period of time. This Court recently recognized that "[p]eople detained for minor offenses can turn out to be the most devious and dangerous criminals." *Florence v. Board of Chosen Freeholders of the County of Burlington*, ____ U.S. ____, 132 S. Ct. 1510, 1520 (2012). Moreover, the Court noted that "[t]he difficulties of operating a detention center must not

be underestimated by the courts," *id.* at 1515, and that "[j]ails can be even more dangerous than prisons because officials there know so little about the people they admit at the outset." *Id.* at 1521.

Maryland sheriffs and local correctional officials operate these facilities and are responsible for housing pretrial detainees. Maryland's District Court Commissioner system tends to result in more temporary commitments to local detention centers than releases on bond. *See* Md. Code Ann., Cts. & Jud. Proc., § 2-607 (2011). Indeed, in the period spanning July 2011 through June 2012, a total of 5175 arrested persons were held in local jails for less than 90 days, and more than 2700 were held for more than 90 days before trial. *See* Office of Grants, Policy, and Statistics, Maryland Department of Public Safety and Correctional Services, *Annual Summary of Monthly Jail Statistics for FY 2012* (2012). (Reproduced in Appendix.)

Even though pretrial detainees may have a somewhat greater expectation of privacy than convicted persons serving sentences, the detention facility has the same interest in identification with respect to both groups. Detention officials are charged with "maintaining institutional security and preserving internal order and discipline . . . [which] may require limitation or retraction of retained constitutional rights of both convicted and pretrial detainees." *Bell v. Wolfish*, 441 U.S. 520, 546 (1979).

The Third Circuit has recognized that collecting identifying information "applies with equal

force to arrestees and pretrial detainees." *United States v. Mitchell*, 652 F.3d 387, 413 (3d Cir. 2011). Moreover, a person's identity is not just "who that person is" but also includes "what that person has done." *Id.* at 414 (quoting *Haskell v. Brown*, 677 F. Supp. 2d 1187, 1199 (N.D. Cal. 2009)). DNA collection serves this interest better than fingerprinting because of the "greater precision of DNA sampling and matching methods." *Id.* at 413.

As DNA matching technology advances and becomes more expeditious, the value of its use will further enhance the ability of correctional officials to properly segregate prisoners and recommend for release or other programs those who would otherwise qualify.

The Court should grant the Petition and recognize this important State interest in protecting the safety of its employees and those in its custody, an interest that clearly satisfies the reasonableness demands of the Fourth Amendment.

3. *The Court should grant the Petition in order to give deference to law enforcement's interests in solving crimes.*

Law enforcement has a strong interest in preventing dead-end investigations, wrongful accusations, and clearing potential suspects. Kevin Lapp & Joy Radice, *A Better Balancing: Reconsidering Pre-Conviction DNA Extraction from Federal Arrestees*, 90 N.C. L. Rev. 157A, 165 (2012).

State legislatures have found that DNA samples and databases are important tools in criminal investigations, in the exclusion of individuals who are the subject of criminal investigations or prosecutions, and in detecting recidivist acts. The various states have enacted DNA collection laws to enhance the ability of federal, state, and local criminal justice and law enforcement agencies in the identification and detection of individuals in criminal investigations, the identification and location of missing and unidentified persons, and the identification and management of individuals kept in custody, either in the short or long-term. *See, e.g.* Fla. Stat. Ann. § 943.325(1)(a) (2012). *See also DA's Office v. Osborne,* 557 U.S. 52, 55 (2009) (noting that DNA testing "has the potential to significantly improve both the criminal justice system and police investigative practices.")

In turn, this more efficient law enforcement process conserves resources and makes for safer communities. These goals would be thwarted if the ruling of the Maryland Court of Appeals is left intact. As well-analyzed by the State in its Petition, the "two search" theory espoused by that court would significantly hamper the police in conducting investigations. Petition at 25-27.

Moreover, the Court of Appeals' entire search analysis runs counter to *Schmerber v. California,* 384 U.S. 757 (1966), a case in which this Court approved the non-consensual drawing of a suspect's blood sample as appropriate incident to his arrest for

driving under the influence. In *Schmerber*, the Court recognized that both the extraction and "the test chosen to measure petitioner's blood-alcohol level" were reasonable. *Id.* at 771. The Court considered seizure of the sample and the analysis thereof to be a single, reasonable evidentiary process that satisfied the requirements of the Fourth Amendment. The Court should find that DNA sampling and testing, which are less intrusive than blood sampling, are likewise constitutional as one seamless seizure and search.

4. *The State has a strong interest in instilling public confidence in the police and deterring crime.*

There is a strong governmental and societal interest in helping crime victims cope with what has happened to them and the possible life-altering effects it may have. The government has a "monumental" interest in "bring[ing] closure to countless victims of crime who long have languished in the knowledge that perpetrators remain at large." John D. Biancamano, Note, *The Evolving Nature of DNA Collection Statutes and their Fourth Amendment Justifications*, 70 Ohio St. L.J. 619, 636 (2009) (quoting *United States v. Kincade*, 379 F.3d 813, 838-39 (9th Cir. 2004) (en banc)).

The interest in bringing closure to victims applies with equal vigor to pretrial arrestees as it does to convicted felons on supervised release. Supporting and assisting the victims of crimes further aids law enforcement in its community

relations and criminal prosecutions. Prompt and effective criminal investigation enhances the public's confidence in its police agencies and leads to more effective policing.

Since the enactment of Maryland's DNA collection statute authorizing the collection of samples from both convicted felons and those arrested for burglary and violent crimes, the Governor's Office of Crime Control and Prevention has kept records of the law's effect. Among the recent headlines documented on its website and related to DNA evidence are these:

- *DNA Match in 2003 Silver Spring, Md. Rape Case,* The Washington Post, June 18, 2012
- *Man Sentenced in Killing of 91-year old,* ABC2News, May 4, 2012
- *Hagerstown Man Found Guilty in 2004 Rape,* Frederick News-Post, March 30, 2012
- *Convicted Rapist Found Guilty of Separate Rape in Rockville after 33 Years,* The Gazette, March 23, 2012
- *DNA Hit Leads to 30-year Sentence in 2008 Ocean City Rape,* The Daily Times, March 14, 2012
- *DNA Hit Brings Charges to 1984 La Plata Rape Case,* The Maryland Independent, March 9, 2012
- *Convicted Md. Rapist Admits to More Attacks,* The Washington Post, Feb. 27, 2012

- *DNA Sample Connects Car to Bike Accident, Anne Arundel Police Say*, The Washington Post, Jan. 19, 2012
- *DNA Leads Police to Arrest Man in Rape of 13-year old in 2005*, The Calvert Recorder, Jan. 13, 2012

News, Events & Press Releases, Governor's Office of Crime Control & Prevention, http://www.goccp.maryland.gov/dna/news.php (last visited Aug. 22, 2012).

There can be no doubt that the news of successful investigations and prosecutions serves the State's interest in deterring crime. Further, deterrence efforts and public confidence are undermined when criminals like Mr. King, who was convicted of a violent rape, are allowed to walk free.[3] *King v. State*, 425 Md. 550 (2012).

5. *DNA evidence successfully exonerates persons who are wrongly arrested or convicted.*

Last, the collection and use of DNA evidence has lead to numerous pre- and post-conviction exonerations of individuals who were not responsible for the crimes charged. Law enforcement has a

---

[3] The Court of Appeals' decision has received significant public attention in the State of Maryland. A recent front page article from the *Baltimore Sun* highlighted the potential impact of the decision on innocent victims. In one case, a man convicted of the rape of a 13-year-old girl in 2010 could be set free in light of the Court of Appeals' decision. Yvonne Wenger, *DNA Call Could Undo Rape Case*, Baltimore Sun, June 10, 2012, at 1.

strong interest in preventing wrongful convictions. Indeed, the International Association of Chiefs of Police ("IACP") has identified the problem of wrongful convictions as one of its signature issues to address. Walter A. McNeil, *President's Message: Our Recommitment to Addressing Wrongful Convictions*, The Police Chief, June 2012, at 6. Key to the IACP's efforts is "the increased use of DNA evidence and increased DNA laboratory resources to aid in the exoneration of those wrongfully convicted . . . ." *Id.*

Law enforcement officers recognize that their "ethical obligation of exonerating the innocent is equally matched by the obligation of arresting the guilty." Michael D. Ranalli, *Wrongful Convictions and Officer Safety: Shifting the Focus to the Process*, The Police Chief, Jan. 2012, at 26. DNA evidence aids law enforcement in this effort, preventing investigations from going "in the wrong direction, [allowing] the true perpetrator to remain[] free to prey on new victims." *Id.* at 28.

Again, turning to the headlines, it is obvious that DNA evidence contributes significantly to the proper institution of justice. On June 30, 2012, the *Washington Post* reported that DNA results exonerated two Prince George's County teenagers who had been charged with rape. Investigators indicated that the charges had been based "on the faulty word of an acquaintance of theirs," an accusation that in years past could have lead to a wrongful conviction and imprisonment. Matt

Zapotosky, *DNA Results Exonerate Two Teens in Rape Case*, Wash. Post, June 30, 2012, at B3.

DNA exoneration unfortunately came much later for another Maryland man who served fifteen years in prison before being cleared. His case was reported by the *Washington Post* on October 31, 2010, and posted on the website of the Governor's Office of Crime Control and Prevention. Dan Morse, *After 15 Years in Prison, Montgomery Man is Cleared of Murder*, Wash. Post, Oct. 31, 2010, at C4. *See also News, Events & Press Releases*, Governor's Office of Crime Control & Prevention, http://www.goccp.maryland.gov/dna/news.php (last visited Aug. 22, 2012).

The exoneration of individuals enhances officer safety and protects law enforcement officers from civil liability. Extensive and expensive litigation ensues when the wrongfully arrested or convicted sue officers for constitutional and common law claims. The government has a strong interest in preventing potential liability for itself and its employees.

The Court should grant certiorari in this case in order to establish that statutes authorizing the collection and use of DNA evidence should be evaluated under a totality of the circumstances test balancing an individual's expectation of privacy against the government interest in effective law enforcement, the administration of justice and public safety.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

KAREN J. KRUGER
Counsel of Record
Funk & Bolton, P.A.
Twelfth Floor
36 South Charles Street
Baltimore, MD 21201
410.659.7700
kkruger@fblaw.com

ANNUAL SUMMARY OF MONTHLY JAIL STATISTICS FOR FY 2012
MONTHLY AVERAGES FOR MALES AND FEMALES FOR JULY 2011 - JUNE 2012
BY JURISDICTION AND TRAFFIC TOTALS

JURISDICTION	TRAFFIC IN TAKE	TRAFFIC DE PART URES	POPULATION LAST DAY POP	POPULATION AVG DAILY POP	INCARCERATION STATUS PRETRIAL LT 90 DAYS	PRETRIAL 91+ DAYS	PSI	LOCAL SENTENCE LT 90 DAYS	LOCAL SENTENCE 91-180 DAYS	LOCAL SENTENCE 181-364 DAYS	LOCAL SENTENCE 365 DAYS	LOCAL SENTENCE 366 D-18 MO	LOCAL SENTENCE OVER 18 MO	DOC	OTH -ER
ALLEGANY	148	148	153	145	70	23	1	25	16	9	1	1	1	7	0
ANNE ARUNDEL	763	776	826	817	381	117	1	74	30	39	60	112	10	4	0
BALTO. CITY	2,357	2,354	3,514	3,320	1,629	1,305	90	0	0	0	0	0	0	489	0
BALTIMORE	1,272	1,274	1,398	1,387	662	163	38	95	77	47	93	187	0	27	10
CALVERT	318	312	232	241	73	28	0	17	17	8	18	51	3	2	15
CAROLINE	125	126	108	108	36	11	0	10	11	7	12	20	0	2	1
CARROLL	145	149	231	231	73	39	0	11	10	8	20	60	0	6	4
CECIL	275	270	271	271	113	32	3	33	25	12	23	20	8	3	0
CHARLES	321	331	415	418	112	44	0	51	43	11	30	75	3	12	36
DORCHESTER	141	97	170	171	49	30	0	10	13	12	7	21	0	1	24
FREDERICK	318	322	391	397	289	46	0	41	34	74	2	73	9	8	3
GARRETT	97	97	59	62	16	4	3	8	7	3	5	9	2	1	0
HARFORD	548	544	400	396	118	34	1	96	57	27	23	36	0	8	0
HOWARD	299	299	322	320	108	40	1	18	12	8	22	30	1	3	81
KENT	46	47	69	70	14	6	0	7	5	3	8	8	1	1	14
MONTGOMERY	683	685	958	980	286	123	38	53	24	121	14	207	52	17	23
PR. GEORGE'S	1,233	1,232	1,303	1,313	622	501	0	19	11	10	40	56	1	43	0
QUEEN ANNE'S	86	85	85	86	28	7	1	9	6	3	10	10	2	3	6
ST. MARY'S	195	191	246	242	68	24	1	18	23	9	21	65	14	3	0
SOMERSET	63	59	98	101	14	15	1	9	11	13	15	11	11	0	0
TALBOT	85	87	88	85	23	16	0	8	5	1	7	14	0	1	13
WASHINGTON	225	225	383	401	178	51	5	20	14	17	35	45	4	10	2
WICOMICO	289	295	424	461	142	20	0	118	24	27	48	15	4	16	13
WORCESTER	198	198	198	200	71	24	7	17	12	6	22	34	2	6	0
TOTAL*	122,751	122,370	12,342	12,223	5,175	2,703	191	767	487	475	536	1,160	128	673	245

ANNUAL SUMMARY OF MONTHLY JAIL STATISTICS FOR FY 2012
MONTHLY AVERAGES FOR MALES AND FEMALES FOR JULY 2011 - JUNE 2012
BY JURISDICTION AND TRAFFIC TOTALS

	PROGRAMS					ACTIVITY			
	WORK REL		HOME DET						
JURISDICTION	LAST DAY POP	AVG DAILY POP	LAST DAY POP	AVG DAILY POP	WEEK END POP	MENT COM	SUI- CIDE	WALK -OFF	ES- CAPE
ALLEGANY	32	32	4	4	8	0	0	0	0
ANNE									
ARUNDEL	20	20	40	41	81	3	0	0	0
BALTO. CITY	0	0	30	31	29	13	0	0	0
BALTIMORE	55	59	39	41	33	4	0	1	0
CALVERT	12	13	3	4	16	0	0	0	0
CAROLINE	3	3	2	2	10	0	0	0	0
CARROLL	13	13	5	6	7	0	0	1	0
CECIL	32	29	0	0	19	0	0	0	0
CHARLES	35	36	0	0	19	8	0	0	0
DORCHESTER	3	3	1	1	6	0	0	0	0
FREDERICK	63	63	4	4	1	1	0	0	0
GARRETT	2	1	2	2	5	0	0	0	0
HARFORD	23	24	0	0	43	3	0	0	0
HOWARD	28	26	0	0	11	4	0	0	0
KENT	3	2	1	0	2	0	0	0	0
MONTGOMERY	155	157	0	0	4	8	0	1	0
PR. GEORGE'S	0	0	124	125	10	0	0	0	0
QUEEN ANNE'S	2	2	2	3	7	2	0	0	0
ST. MARY'S	27	27	8	7	12	0	0	0	0
SOMERSET	4	6	1	1	4	0	0	0	0
TALBOT	6	6	2	2	3	0	0	0	0
WASHINGTON	11	11	12	13	15	0	0	0	0
WICOMICO	47	36	1	1	28	8	0	0	0
WORCESTER	17	17	0	0	2	0	0	0	0
TOTAL*	593	586	281	288	375	54	0	3	0

THE ACCURACY OF DATA SUBMITTED BY JURISDICTIONS CANNOT BE GUARANTEED. ZERO VALUE AVERAGES MAY REPRESENT SMALL POPULATIONS. *TOTALS REPRESENT ANNUAL TRAFFIC ACTIVITY AND MONTHLY AVERAGES FOR POPULATIONS, STATUS, PROGRAMS AND ACTIVITY. DUE TO ROUNDING ERROR COMBINED MALE/FEMALE AVERAGES MAY NOT EQUAL THE SUM OF THEIR RESPECTIVE AVERAGES.

AMICUS CURIAE BRIEF

SEP 17 2012
OFFICE OF THE CLERK

No. 12-207

In The
Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,
v.
ALONZO JAY KING JR.,
Respondent.

On Petition for Writ of Certiorari To the Court of Appeals of Maryland

BRIEF *AMICI CURIAE* MARYLAND LEGISLATORS IN SUPPORT OF PETITIONER

CLIFFORD M. SLOAN
Counsel of Record
ALEX T. HASKELL
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7000
cliff.sloan@skadden.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE SECTION OF THE MARYLAND DNA COLLECTION ACT AT ISSUE PASSED WITH THE OVERWHELMING SUPPORT OF MARYLAND LEGISLATORS, EXECUTIVES, AND LAW ENFORCEMENT OFFICIALS 5

II. THE LAW'S "SUNSET PROVISION" UNDERSCORES THE NEED FOR THIS COURT'S REVIEW 8

CONCLUSION 10

APPENDIX 1a

TABLE OF AUTHORITIES

CASES

Alonzo Jay King, Jr. v. State of Maryland,
42 A.3d 549 (Md. 2012) 3

Anderson v. Commonwealth,
650 S.E.2d 702 (Va. 2007) 9

Haskell v. Harris,
669 F.3d 1049 (9th Cir. 2012) 9

United States v. Mitchell,
652 F.3d 387 (3d Cir. 2011) 9

CONSTITUTION

Md. Const. art. III, § 14 8

U.S. Const. amend. IV 9

STATUTES

Md. Code Ann., Pub. Safety Art.,
§ 2-504 (2011 Repl. Vol.) 4, 5, 8

OTHER AUTHORITIES

H.B. 370, 425th Leg., Judiciary Comm. Voting
Record (Md. 2008) 5

Legislative Position of the Prince George's
Cnty. Gov't on S.B. 211
to the Senate Judicial Proceedings
Comm. (Feb. 13, 2008) 6

Letter from A. R. Smith, City of Hagerstown
Dep't of Police, Chief, to Senator Brian E.
Frosh and Other Members of the Senate
Judicial Proceedings Comm. (Jan. 30, 2008) .. 6, 7

Letter from David A. Goad, Sheriff, Allegany Cnty., to Senator Brian E. Frosh (Jan. 30, 2008) 7

Letter from John J. McCarthy, State's Attorney, Montgomery Cnty., and Ike Leggett, Cnty. Exec., Montgomery Cnty., to Senator Brian E. Frosh and Delegate Joseph F. Vallario (Mar. 7, 2008) 7

Letter from John "Rodney" Bartlett, Jr., President, Fraternal Order of Police, Md. State Lodge, to Senator Brian E. Frosh (Feb. 27, 2008) 7

Letter from Sheila Dixon, Mayor, City of Baltimore, to Senator Brian E. Frosh (Mar. 11, 2008) 6

S.B. 211, 425th Leg., Judicial Proceedings Comm. Voting Record (Md. 2008) 5, 6

S.B. 211/H.B. 370, 425th Leg., Legislative History (Md. 2008) 5

Statement of Colonel Terrence Sheridan, Superintendent, Md. State Police, to the Senate Judicial Proceedings Comm. on S.B. 211/H.B. 370 (Feb. 13, 2008) 7

Statement of Governor Martin O'Malley, Governor, State of Md., to the Senate Judicial Proceedings Comm. on S.B. 211 (Feb. 13, 2008) 6

Testimony of the Md. Municipal League to the Senate Judicial Proceedings Comm. on S.B. 211 (Feb. 13, 2008) 6

INTEREST OF *AMICI CURIAE*[1]

Amici are Maryland legislators from both political parties.

Kathryn L. Afzali has been a Member of the Maryland House of Delegates since 2011. She represents District 4A (Frederick County).

Samir Arora has been a Member of the Maryland House of Delegates since 2011. He represents District 19 (Montgomery County).

Charles E. Barkley has been a Member of the Maryland House of Delegates since 1999. He represents District 39 (Montgomery County).

James Brochin has been a Member of the Maryland Senate since 2003. He represents District 42 (Baltimore County).

Galen R. Clagett has been a Member of the Maryland House of Delegates since 2003. He represents District 3A (Frederick County).

John W. E. Cluster, Jr. has been a Member of the Maryland House of Delegates since 2011, and was a Member from 2003 to 2007. He represents District 8 (Baltimore County).

---

[1] Counsel of record for both parties were timely notified of the intention to file this brief. Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made any monetary contribution to the preparation or submission of this brief.

Richard F. Colburn has been a Member of the Maryland Senate since 1995. He represents District 37 (Caroline, Dorchester, Talbot and Wicomico Counties).

Steven J. DeBoy, Sr. has been a Member of the Maryland House of Delegates since 2003. He represents District 12A (Baltimore and Howard Counties).

Donald B. Elliott has been a Member of the Maryland House of Delegates since 1987. He represents District 4B (Carroll and Frederick Counties).

Brian J. Feldman has been a Member of the Maryland House of Delegates since 2003. He represents District 15 (Montgomery County).

Barbara A. Frush has been a Member of the Maryland House of Delegates since 1995. She represents District 21 (Anne Arundel and Prince George's Counties).

Jolene Ivey has been a Member of the Maryland House of Delegates since 2007. She represents District 47 (Prince George's County).

Kevin Kelly has been a Member of the Maryland House of Delegates since 1999, and was a Member from 1987 to 1995. He represents District 1B (Allegany County).

Nicholaus R. Kipke has been a Member of the Maryland House of Delegates since 2007. He represents District 31 (Anne Arundel County).

Michael A. McDermott has been a Member of the Maryland House of Delegates since 2011. He represents District 38B (Wicomico and Worcester Counties).

Joseph J. Minnick has been a Member of the Maryland House of Delegates since 1995, and was a member from 1988 to 1991. He represents District 6 (Baltimore County).

Frank S. Turner has been a Member of the Maryland House of Delegates since 1995. He represents District 13 (Howard County).

Cathleen M. Vitale has been a Member of the Maryland House of Delegates since 2011. She represents District 33A (Anne Arundel County).

C.T. Wilson has been a Member of the Maryland House of Delegates since 2011. He represents District 28 (Charles County).

SUMMARY OF ARGUMENT

The opinion of the Court of Appeals of Maryland in *Alonzo Jay King, Jr. v. State of Maryland*, 42 A.3d 549 (Md. 2012) declared unconstitutional a vitally important, and broadly supported, section of the Maryland DNA Collection Act, passed in 2008 by the Maryland General Assembly. The section at issue requires the collection of DNA samples from individuals charged with specified crimes. Md. Code Ann., Pub. Safety Art., § 2-504(a)(3) (2011 Repl. Vol.).

Amici agree with the arguments for certiorari set forth in the petition. For the benefit of this Court,

and based on the Maryland General Assembly's unique role as the entity responsible for the overturned law, *amici* respectfully submit this brief to highlight two points.

First, the law addresses an issue of paramount importance and received broad support from Maryland legislators, the Maryland Governor and local government executives, and Maryland law enforcement authorities.

Second, the fact that the current law contains a "sunset provision" providing for expiration after December 31, 2013 in no way undermines the importance of reviewing the Court of Appeals' decision and the issues it addresses. To the contrary, it highlights the importance of this Court's review: if this Court does not review the far-reaching, erroneous decision of the Court of Appeals (which unquestionably conflicts with other federal and state appellate decisions), the General Assembly will be unable to extend or re-enact the disputed provision in the lone legislative session that will occur before its expiration. If, as *amici* believe, the Court of Appeals' decision misconceives the governing constitutional principles, the General Assembly's ability to extend and enact this important law protecting public safety through accurate crime detection should not be wrongly foreclosed by a mistaken interpretation of what the Constitution prohibits.

ARGUMENT

I. THE SECTION OF THE MARYLAND DNA COLLECTION ACT AT ISSUE PASSED WITH THE OVERWHELMING SUPPORT OF MARYLAND LEGISLATORS, EXECUTIVES, AND LAW ENFORCEMENT OFFICIALS

In 1994, the Maryland General Assembly passed the DNA Collection Act. Md. Code Ann., Pub. Safety Art., § 2-504 (2011 Repl. Vol.). In 2008, acting pursuant to its fundamental obligation to provide a fair and effective criminal justice system, the General Assembly amended the Act to allow for the collection of DNA samples from persons charged with certain qualifying offenses. *Id.* § 2-504(a)(3). The 2008 amendments allow law enforcement officials to identify individuals accused of serious crimes, to resolve open criminal investigations more efficiently, and to pursue repeat offenders more effectively.

Maryland legislators overwhelmingly supported the 2008 amendments. The Maryland Senate and House of Delegates passed the amendments by sweeping margins, with bipartisan support. The Maryland Senate approved the bill by a 33 to 10 vote; it had been approved by the Judicial Proceedings Committee on a 9 to 2 vote. The House of Delegates likewise passed the bill with overwhelming support. The Delegates approved the bill on a 131 to 8 vote; the House Judiciary Committee had approved it on a 19 to 3 vote. S.B. 211/H.B. 370, 425th Leg., Legislative History (Md. 2008); S.B. 211, 425th Leg., Judicial Proceedings

Comm. Voting Record (Md. 2008); H.B. 370, 425th Leg., Judiciary Comm. Voting Record (Md. 2008).

In addition to legislators, Maryland government executives strongly supported the amendments. Governor Martin O'Malley urged the Senate and House of Delegates to pass their respective bills, stating that the "foremost responsibility of government is to protect its citizens from violent crime" and arguing that the modification of Maryland's DNA law was "necessary if we hope to significantly decrease" the occurrence of such crimes. Statement of Governor Martin O'Malley, Governor, State of Md., to the Senate Judicial Proceedings Comm. on S.B. 211 (Feb. 13, 2008) (App. 1a-5a). Local government officials throughout the state, including the Mayor of Baltimore, the Prince George's County government, and executive officials from various municipalities similarly supported the bill. *See, e.g.*, Letter from Sheila Dixon, Mayor, City of Baltimore, to Senator Brian E. Frosh (Mar. 11, 2008) (App. 6a-8a); Legislative Position of the Prince George's Cnty. Gov't on S.B. 211 to the Senate Judicial Proceedings Comm. (Feb. 13, 2008) (App. 9a-10a); *see also* Testimony of the Md. Municipal League to the Senate Judicial Proceedings Comm. on S.B. 211 (Feb. 13, 2008) (App. 11a-12a).

Moreover, Maryland law enforcement officials—those on the front lines in combating and investigating crime—also vigorously supported the 2008 amendments. City police departments, county sheriffs, state's attorneys, and various associations representing the law enforcement community advocated passage. *See, e.g.*, Letter from A. R. Smith,

City of Hagerstown Dep't of Police, Chief, to Senator Brian E. Frosh and Other Members of the Senate Judicial Proceedings Comm. (Jan. 30, 2008) (App. 13a-14a); Letter from David A. Goad, Sheriff, Allegany Cnty., to Senator Brian E. Frosh (Jan. 30, 2008) (App. 15a-16a); Letter from John J. McCarthy, State's Attorney, Montgomery Cnty., and Ike Leggett, Cnty. Exec., Montgomery Cnty., to Senator Brian E. Frosh and Delegate Joseph F. Vallario (Mar. 7, 2008) (App. 17a-19a); Letter from John "Rodney" Bartlett, Jr., President, Fraternal Order of Police, Md. State Lodge, to Senator Brian E. Frosh (Feb. 27, 2008) (App. 20a-21a). Colonel Terrence Sheridan, Superintendent of the Maryland State Police, testified in the Senate and the House of Delegates, emphasizing that it was the "body's moral obligation to allow for the expansion of a technology which has proven itself capable of providing the criminal justice system with conclusive evidence of guilt and more importantly, of innocence." Statement of Colonel Terrence Sheridan, Superintendent, Md. State Police, to the Senate Judicial Proceedings Comm. on S.B. 211 (Feb. 13, 2008) (App. 22a to 29a).

The provision found unconstitutional by the Court of Appeals thus was adopted with broad support by the Maryland legislators, government executives, and law enforcement authorities charged with the solemn duty of providing the public with a sound and responsible criminal justice system.

II. THE LAW'S "SUNSET PROVISION" UNDERSCORES THE NEED FOR THIS COURT'S REVIEW

Section 2-504(a)(3) of the Maryland DNA Collection Act contains a "sunset provision" that will cause the portion of the Act to lapse after December 31, 2013. Md. Code Ann., Pub. Safety Art., § 2-504(a)(3) (2011 Repl. Vol.). The Court of Appeals' opinion, if not reviewed, will erroneously prevent the Assembly from extending and enacting the law at issue, notwithstanding its importance, its broad public support, and its constitutionality.

Each year, the Maryland General Assembly convenes annually for one ninety-day legislative session between early January and early April. *See* Md. Const. art. III, § 14. But for the Court of Appeals' opinion, the General Assembly will consider (and, in *amici*'s respectful opinion, reauthorize) the section of the Act at issue in this case during the 2013 legislative session. Given the sweeping margins by which the Senate and House of Delegates passed the 2008 amendments, the strong support from Maryland executives and law enforcement officials, and the publicly beneficial results from the law's enactment, it is reasonable to assume that the General Assembly would vote to extend and reauthorize the provision if so permitted. At the very least, the Assembly would be able to give full consideration to this critical public issue.

Unfortunately, the Court of Appeals has severely and unjustifiably circumscribed the legislative authority of the General Assembly on this issue through its opinion in *King*. In so doing, the

Court of Appeals has left the General Assembly incapacitated, unable to provide Maryland's criminal justice system with a strongly supported tool found constitutional by courts throughout the country.[2] The Court of Appeals' decision, moreover, will undermine national law enforcement efforts—also contrary to the intent of the state legislators, the government executives, and the state and local law enforcement authorities who worked for passage—because DNA samples collected by the state are entered into the Federal Bureau of Investigation's nationwide DNA database.

By granting the State of Maryland's Petition for Writ of Certiorari, this Court can consider the important and recurring issues raised by the Court of Appeals' decision. Granting the Writ of Certiorari will allow the Court to provide essential guidance to Maryland legislators, law enforcement officials, and judges regarding the scope of the Fourth Amendment and the scope of the Assembly's permissible discretion on this important issue, which now has been sharply truncated by the Court of Appeals. Such guidance is similarly required outside Maryland, by lawmakers in the twenty-six other states that currently provide for the collection of

---

[2] The decision in *King* conflicts with decisions of the U. S. Courts of Appeals for the Third and Ninth Circuits as well as the Virginia Supreme Court, which have upheld statutes similar to Maryland's DNA Collection Act. *See United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1741 (2012); *Haskell* v. *Harris*, 669 F.3d 1049, *reh'g en banc granted*, 686 F.3d 1121 (9th Cir. 2012); *Anderson v. Commonwealth*, 650 S.E.2d 702 (Va. 2007), *cert. denied sub nom. Anderson v. Virginia*, 553 U.S. 1054 (2008).

DNA samples from arrestees, and in the states currently considering adopting such legislation. Particularly given the severely restricted position in which the Maryland General Assembly now has been placed, and the urgency with which guidance is needed nationwide, this case is the proper vehicle for resolving this crucial Fourth Amendment question.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, *amici* respectfully request that the Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

CLIFFORD M. SLOAN
Counsel of Record
ALEX T. HASKELL
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7000
cliff.sloan@skadden.com

September 17, 2012

APPENDIX

STATE OF MARYLAND
OFFICE OF THE GOVERNOR

MARTIN O'MALLEY
GOVERNOR

STATE HOUSE
100 STATE CIRCLE
ANNAPOLIS, MARYLAND 21401 -1925
410-974-3901
TOLL FREE: 1-800-811-8336
TTY USERS CALL VIA MD RELAY

Statement of Governor Martin O'Malley

SENATE BILL 211

Public Safety - Statewide DNA Data Base System - Crimes of Violence, Burglary, and Breaking and Entering a Motor Vehicle - Sample Collections on Arrest

Senate Judicial Proceedings Committee

February 13, 2008

The foremost responsibility of government is to protect its citizens from violent crime and the predators who seek to destroy the safety and security of our communities. Swift apprehensions

and the just convictions of violent felons increase public safety throughout our State. The expanded use of forensic DNA by state and local law enforcement officials across the Country has not only led to the apprehension and conviction of many violent offenders, it has exonerated the wrongly convicted.

In order to enhance our law enforcement efforts to resolve open cases, I ask for your support of Senate Bill 211. This legislation, which was introduced last year by Senator Norman Stone, will require the collection of DNA samples from offenders charged with a crime of violence or burglary at the time of their arrest. This evolution in Maryland's DNA law is necessary if we hope to significantly decrease violent crime.

Our legislation is modeled after Virginia's successful DNA program, enabling Maryland to join 11 other states who currently collect DNA from violent crime suspects at the time of arrest. It is important to note that Virginia's statute was recently upheld as constitutional by Virginia's Supreme Court in Anderson v. Commonwealth of Virginia, 650 S.E. 2d 702 (2007). Their highest Court cited, adopted and expanded the Maryland Court of Appeals holding in State v. Raines, 383 Md. 1,857 (2004), which stated, "The purpose of [the DNA profile] is akin to that of a fingerprint. As such, appellee and other incarcerated individuals have little, if any, expectation of privacy in their identity." The Court went on to state that "(f)ingerprinting an arrested suspect has long been considered a part of the routine booking process. Similarly, the taking of a DNA sample by minimally intrusive means is 'justified by the legitimate

interest of the government in knowing for an absolute certainty the identity of the person arrested, in knowing whether he is wanted elsewhere, and in ensuring his identification in the event he flees prosecution." Anderson, 706. I am confident our statute is constitutional and when reviewed by our courts, it will survive scrutiny.

By expanding Maryland's DNA Database, law enforcement will be able to more efficiently resolve open criminal investigations, pursue repeat offenders, and save valuable time pursuing false leads by effectively eliminating suspects from ongoing investigations. It is estimated that by adding the arrestees of violent crimes and burglaries to our current DNA database, we will add approximately 31,000 samples to our database per year. DNA is a powerful tool for state and local law enforcement; the anticipated $2.6 million per annum required to improve our efforts will pay significant dividends in saved lives.

Criminal history records reveal that repeat offenders typically have multiple violent felony arrests before a conviction is secured. Virginia has learned that approximately 40 percent of its solved violent crimes were perpetrated by those with previous property crime convictions.

In our State, the trends have been no different. For example, one need only look at the case of career criminal, John Doe who has been arrested 16 times since 1976. Under our proposed legislation, DNA could have been collected at the time of 10 of his arrests, some of which were sex offenses. Due to DNA, Baltimore County charged John Doe with a

murder and a rape in 2000 and another rape in 2004 - all crimes dating from 1986. It seems that John Doe may have left his DNA at the scenes of these crimes allegedly committed 20 years ago.

Unfortunately, since those heinous crimes were committed, the following opportunities to end John Doe's violent crime spree were missed:

- John Doe was arrested for assault with intent to murder in 1986.
- John Doe was arrested for robbery.
- John Doe was arrested for rape and robbery.
- John Doe was arrested for a 1st degree sex offense.
- John Doe was arrested for robbery with a deadly weapon.

Under the proposed legislation, law enforcement would have been able to obtain a match using DNA samples collected from John Doe, thus avoiding these above mentioned missed opportunities. Were we able to take a DNA fingerprint at the time of these five arrests, John *Doe* would have been charged with murder and rape years earlier – avoiding at least one violent crime against a Maryland citizen.

We are making progress in the utilization of DNA technology. In the past year, Maryland's DNA backlog of 2,300 offender samples has been moved from dormancy on the shelves of our State's crime lab into action in the Federal Bureau of Investigation's Combined DNA Index System. Due to the cleared backlog, access to offenders' samples is available to federal, state, and local law enforcement

officials. Through the creation of DNA Stat, our database is fully functioning as an effective crime prevention tool. Crucial positions in the crime lab that for years have been vacant and unfunded have been filled; $800,000 has been spent to fund long term equipment needs. A total of 4,682 new samples have been obtained from convicted offenders and 97% of the Division of Corrections inmates who owed samples were collected. As a result the number of positive DNA matches or hits increased by 51% in 2007 from 2006, with a total of 287 hits.

This increase in hits has assisted local and state police in apprehending many violent criminals. In Baltimore County, 24 rape cases were cleared because of DNA leading to the arrest or charging of 15 suspects. In Montgomery County, the DNA profile of a convicted offender matched a profile of a 1995 rape, the identification of the perpetrator was verified and an arrest warrant has been issued. Howard County, Prince George's County and Baltimore City have also resolved open crimes as a result of the enhanced DNA Database. Simply put, the minimally intrusive step of swabbing DNA at the time of conviction saves lives; taking DNA at the time of arrest, will save even more lives.

In conclusion, I respectfully request your support of Senate Bill 2 11.

SHEILA DIXON
Mayor
250 City Hall
Baltimore, Maryland 21202

March 11,2008

Senator Brian E. Frosh
110 College Avenue
Annapolis, Maryland 21401-1991

Dear Senator Frosh:

We are making tremendous strides in the reduction of violent crime in Baltimore City and DNA continues to be an important tool to protect our citizens. When a violent offender is identified and taken off our streets, we have prevented future crimes and victims. I have reviewed Senate Bill 211, and I believe that the sampling of DNA of persons who are charged with crimes of violence will be a useful too that will help improve public safety.

Commissioner Frederick H. Bealefeld III informs me that as a result of Maryland's DNA backlog elimination, we have had more DNA CODIS hits on cold cases than ever before. Out of 287 total DNA CODIS hits in 2007,124 have benefited

investigations in Baltimore. Using DNA, police are quickly and accurately determining if individuals are linked to any cold cases.

Senate Bill 211 targets repeat violent offenders like Alphonso Hill, a serial rapist who attacked victims in Baltimore for thirty (30) years. Hill has been charged with over thirty (30) crimes, including murders, rapes, robberies, and burglaries. Had we been able to take his DNA upon arrest for an assault with intent to rob in 1979, it would have been matched with evidence recovered from his first rape in 1978. Mr. Hill would have been convicted much earlier in his criminal career and the victims he later attacked would have been spared.

This bill limits DNA sampling to arrests for crimes of violence and the types of property crimes offenders like Hill commit early in their criminal careers. This bill does not target those persons who are Released Without Charges (RWOC) in Baltimore. Of 3553 RWOC cases from October 2007 through January 2008, no arrestees would have qualified to give their DNA under the proposed legislation.

Fingerprints are taken from every arrestee in Baltimore City. This bill requires DNA, the fingerprint of the 21st Century, to be taken upon arrest for violent crimes and property crimes that are statistically shown to be precursors to violence. Victims will be spared, valuable investigative resources will not be wasted pursing false suspects, and those who are wrongfully accused of serious crimes will be freed in a timely manner. In short, enacting this legislation will protect the rights of law-abiding citizens.

Improved public safety for our constituents is a goal we share and should work toward together. I urge you to support this legislation and continue to work with me in pursuit of a safer Baltimore.

Sincerely,

[signature]

Sheila Dixon
Mayor
Baltimore City

SD:sg

Visit Our Website@ www.baltimorecity.gov

THE PRINCE GEORGE'S COUNTY GOVERNMENT

LEGISLATIVE POSITION

Number: SB 211 Public Safety Statewide DNA Data Base System Crimes of Violence, Burglary, and Breaking and Entering a Motor Vehicle Sample Collections on Arrest

Sponsor: The President (By Request-Administration), et al.

Issue: This bill will require the collection of a DNA sample from anyone convicted of a felony, breaking and entering a motor vehicle, and burglary in the 4th degree. Additionally, anyone arrested for a crime of violence or an attempt to commit a crime of violence, burglary or an attempt to commit burglary, or breaking and entering a motor vehicle would be subject to the collection of a DNA sample at some time during the arrest or booking of the suspect. The DNA profile will be entered and stored in the Maryland statewide DNA data base system.

Position: **Support**

Solution: Technological advances have provided law enforcement agencies with the tools needed to more precisely analyze evidence gathered at the scenes of the

most serious crimes. Courts in all fifty states have accepted the scientific validity of DNA profiling for many years, and many "cold cases" have been solved using this technology. Having this data allows prosecutors and police officers to pursue and successfully prosecute those responsible for these crimes.

There are currently 11 states that allow for the collection of DNA samples from arrestees in certain cases, including Alaska, Arizona, North Dakota and Tennessee, who enacted laws in 2007. SB 211 will allow the Maryland law enforcement community to broaden the DNA database, aid in solving crime and increase the safety of the citizens of Maryland.

Prince George's County supports this bill.

Fiscal Impact: Undetermined

Committee: Judicial Proceedings

Hearing Date: 13-Feb-2008 at 1:00pm

Prepared by: Prince George's County Office of Legislative Affairs

47 State Circle, Suite 102 Annapolis, MD 21401
Tel: (301) 261-1735 Fax: (301) 261-1784

MARYLAND MUNICIPAL LEAGUE

The Association of Cities and Towns

TESTIMONY

February 13, 2008

Committee: Judicial Proceedings

Bills: SB 211 (Public Safety Statewide DNA Data Base System — Crimes of Violence, Burglary, and Breaking and Entering a Motor Vehicle — Sample Collections on Arrest)

Position: Support

Reason for Position:

The Maryland Municipal League supports SB 211, an Administration initiative to require DNA samples to be taken from individuals arrested for crimes of violence, burglary and motor vehicle breaking and entering. The intent is to build a bank of DNA samples to be used just as fingerprints are currently used to identify and apprehend criminal suspects.

The Maryland Municipal League and its 87 member cities and towns that provide police protection are pleased to endorse efforts to better utilize DNA identification technology to help fight crime. We therefore ask that this committee provide SB 211 with a favorable report.

FOR MORE INFORMATION CONTACT:

Scott A. Hancock	Executive Director
Candace L. Donoho	Director, Government Relations
James P. Peck	Director, Research & Information Management

1212 West Street. Annapolis. Maryland 21401-3635
410-268-5514 / 800-492-7121 / FAX 410-268-7004 /
WEB URL www.mdmunicipal.org / E-MAIL
mml@mdmunicipal.org

CITY OF HAGERSTOWN
MARYLAND
21740-4696

DEPARTMENT OF POLICE
50 N. Burhans Blvd
Non-Emergency 301-739-3700
Emergency 301-739-6000
Fax 301-733-5513

January 30, 2008

Chairman Brian Frosh and Other Members of the
Senate Judicial Proceedings Committee
Miller Senate Office Building
2 East Wing
11 Bladen Street
Annapolis, Maryland 21401

Re: SB 211 – Statewide DNA Data Base System

Honorable Committee Members:

I would like to express my strong support for Governor O'Malley's current initiative to strengthen Maryland's DNA statute.

As is clear, the current law is insufficient and fails to include many of the individuals who are likely to be involved in the types of crimes in which DNA evidence is most often recovered. As a current police

chief and a former member of Baltimore's Homicide Unit, I am acutely aware of the evidentiary value of DNA evidence. It provides a scientific basis for prosecution and as we have learned form experience, it is also likely to clear an innocent suspect against whom a strong case may otherwise exist.

In terms of being overly "intrusive" to the person from whom DNA is collected, I would submit for consideration that a simple mouth swab is no more intrusive than being fingerprinted and photographed at the time of arrest.

Other states, Virginia being a nearby example, have had excellent results with their statutes.

I would finally submit that as legislators, it is your responsibility to impact positively on Maryland's consistently high ranking nationwide—5th currently—for violent crimes on a per capita basis. This is a particularly disturbing statistic when viewed in context with Maryland's number one ranking in per-capita income. This presents a unique opportunity to make a difference in the lives of Marylanders.

Respectfully,

[signature]

A.R. Smith
Chief - HPD

January 30, 2008

The Honorable Brian Frosh
Senator
Chairman Senate Judicial Proceedings Committee
Miller Senate Office Building, 2 East Wing
11 Bladen Street, Annapolis, Maryland 21401

Dear Chairman Frosh:

I write in support of Senate Bill 211 — Public Safety — Statewide DNA Data Base System — Crimes of Violence, Burglary, and Breaking and Entering a Motor Vehicle — Sample Collections on Arrest.

As a member of the law enforcement community for the past 29 years it is my belief that such legislation is vital to public safety. The current system of DNA recordation has proven to be a success in the closure of criminal cases. These new requirements will provide a critical resource tool for future criminal investigations, as most criminals are known recidivists.

My agency, as with numerous sheriffs' offices across the country, has the responsibility of maintaining the county detention centers and thereby receives those individuals charged with committing felony crimes. The collection of DNA Samples during the phase of inmate booking is truly an appropriate environment. The collection and recording of such DNA markers will ensure thorough analysis and inclusive comparisons of suspects within a specific criminal investigation.

This Statewide DNA data base system then provides for an enhanced central repository to enable the identification of individuals accused of criminal activity.

It is my desire that this bill be given strong deliberation by your committee and ultimately returned to the full Senate for confirmation.

Your consideration of this legislation is greatly appreciated and necessary for public safety.

Sincerely,

[signature]

David A. Goad
Sheriff
Allegany County, Maryland

State's Attorney for
Montgomery County

50 Maryland Avenue
Rockville, Maryland 20850

March 7, 2008

The Honorable Brian E. Frosh
2 East Wing Miller Senate Office Building
Annapolis, MD 21401

The Honorable Joseph F. Vallario
101 Lowe House Office Building
Annapolis, MD 21401

Re: SB 211 HB 370 Public Safety — Statewide DNA Data Base System — Crimes of Violence, Burglary, and Breaking and Entering a Motor Vehicle Sample Collections on Arrest

Dear Chairman Frosh and Chairman Vallario:

We are writing to strongly urge passage of SB 211 and HB 370. These important pieces of life saving legislation will serve to expand Maryland's DNA database system giving local law enforcement a critical tool to aid them in criminal investigations. These bills require the collection of DNA samples from persons arrested for Crimes of Violence as defined in Section 14-101(a) of the Maryland Criminal Law Article, as well as for burglaries and breaking and entering of motor vehicles. A total of 11 states, including Virginia, California, Texas and New Mexico have enacted similar legislation and an additional 2[illegible] others are considering

it. SB 211 / HB 370 will allow law enforcement to compare newly collected DNA to existing cases and older cold cases as well as those that occur in the future. The legislation will serve not only to protect the public against repeat violent offenders, but will also serve to exonerate individuals detained for offenses they did not commit.

With respect to issues of privacy and civil liberties, the procedure for collecting DNA under SB 211 / H8 370 will be no more intrusive than the taking of fingerprints. Collection will be done by swabbing the inside of the person's mouth at the time of arrest. Moreover, the scope is limited to arrests for specific violent crimes specified by statute and the property crimes indicated above. Specified property crimes have been included, based upon research in Virginia indicating that roughly 40% of violent offenders had previous property crimes convictions. In addition, the DNA samples for these investigative purposes will not test for nor reveal genetic health information. Furthermore, in the event the arrestee is acquitted or if the charges are dropped, his DNA profile can be expunged from police records.

The Maryland Court of Appeals in *State v. Reines,* 383 Md. 1 (2003), has previously addressed the issue of collecting DNA upon conviction. The Court found collection permissible, indicating that it is in the public's best interest for offenders likely to re-offend to have a lessened expectation of privacy. Moreover, in citing *Jones v. Murray,* a 1992 case from the Fourth Federal Circuit, the *Raines* Court noted, when a suspect is arrested, "his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it. We

accept this proposition because the identification of suspects is relevant not only to solving the crime for which the suspect is arrested, but also for maintaining a permanent record to solve other past and future crimes."

We believe that passage of these bills will enable law enforcement to solve crimes more quickly by using science to identify offenders earlier in the investigation, to prevent crime by linking repeat violent offenders to existing and older cases and keeping them behind bars, to free the innocent and to be used as an investigative tool that is blind to racial bias.

Thank you for your consideration of our position.

Sincerely,

[signature]

John J. McCarthy
State's Attorney
Montgomery County, Maryland

[signature]

Ike Leggett
County Executive
Montgomery County, Maryland

cc: Governor Martin O'Malley
Senate Judicial Proceedings Committee
House Judiciary Committee

MARYLAND STATE LODGE
FRATERNAL ORDER OF POLICE
1506 LESLIE ROAD, BALTIMORE, MD 21222

February 27, 2008

Senator Brian Frosh
Chairman, Judicial Proceedings Committee
Miller Senate Office Building, Ste 2E
Annapolis, Maryland 21401-1991

RE: SB 211 – "Public Safety - Statewide DNA Data Base System Crimes of Violence, Burglary, and Breaking and Entering
A Motor Vehicle - Sample Collections on Arrest

Dear Senator Frosh & Members of the Committee:

The Maryland Slate Fraternal Order of Police hereby strongly supports SB 211. This bill requires the collection of a DNA sample from an individual charged with crimes of violence, burglary, or B&E of a motor vehicle upon arrest at the facility where the arrest is processed. Sample of a DNA must also be expunged from statewide system if request is granted.

This bill certainly makes it easier for law enforcement officers to do their job. Quite often, we are hindered by not having access to good DNA

evidence and therefore, making it difficult to solve a crime and put the bad guys in jail. This bill effectively addresses that issue.

We urge a favorable report on this legislation. Thank you.

Respectfully,

[signature]

John "Rodney" Bartlett, Jr.
President

Representing the Professional Police Officers of the State of Maryland

Statement of Colonel Terrence Sheridan

HOUSE BILL 370/SENATE BILL 211

Public Safety – Statewide DNA Database System – Crimes of Violence, Burglary, and Breaking and Entering a Motor Vehicle – Sample Collections on Arrest

Senate Judicial Proceedings Committee

February 13, 2008

- Good afternoon, Mr. Chairman and members of the Committee. I am Colonel Terrence Sheridan, Superintendent of the Maryland State Police. I am here today with this esteemed panel to ask for favorable consideration of House Bill 370/Senate Bill 211;

- House Bill 370/Senate Bill 211 represents a key component required to assist our state in moving forward toward adopting responsible public safety policy;

- This legislation requires the collection and subsequent entry of the DNA sample of a person who has been arrested for a crime of violence, burglary, and one misdemeanor (6-206) into Maryland's DNA database;

- By expanding our DNA database to include arrestee samples we simultaneously increase the likelihood of:

1. Solving future crimes

Chicago's Study on Preventable Crimes

- Study completed in 2005 by the City of Chicago and presented to the Illinois Legislature in support of similar legislation
- The study examined the criminal history of 8 violent offenders
- It found that the 8 offenders in Chicago accumulated 21 felony arrests before finally being identified in violent crimes
- The study identified that in aggregate, the offenders committed 22 murders, 30 rapes and a number of attempted rapes and kidnappings which would have been prevented had the offender's DNA samples been collected in their previously undetected violent crimes

2. Solving old or cold cases

The cold hits resulting from the matching in CODIS identifies approximately one offender for every 1,000 samples contained in CODIS. Christopher H. Asplen, *From Crime Scene to Courtroom: Integrating DNA Technology into the Criminal Justice System*, 83 Judicature 144, 147 (1999).

3. Exonerating suspects and those wrongly accused/convicted

4. Providing law enforcement with evidence more reliable than eyewitness testimony thereby decreasing the current dependence on eyewitness testimony

An article written in the Missouri Bar, September-October 2003 edition reported that the Department of Justice reviewed 28 cases of people wrongly convicted of sexual assault and later exonerated by DNA evidence. With the exception of six homicides included in the study, each case involved significant reliance on eyewitness testimony by the victim. Edward Connors et al., U.S. Department of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial,*

5. Preventing future crimes from ever occurring. Offenders and arrestees are unlikely to commit crimes knowing that a simple search of a DNA database could conclusively identify them as an offender.

Mark Schoofs, *Genetic Justice,* Village Voice, November 18, 1997, at 44 (quoting Carlos Rebren, the director of Alabama's forensic science department, who said that maintaining an individual's DNA profile might "discourage [him] from criminal misconduct").

The demonstrated success realized by other states that have expanded their DNA databases to include arrestee samples cannot be ignored. Virginia is one of those successful states and is the state we have chosen to follow with regard to our legislative proposals;

- According to FBI CODIS Statistics, as of October, 2007 Virginia's State DNA database has:

VIRGINIA	
Offender Profiles	260,403
Forensic Samples	8,063
Investigations Aided	4,282

- Virginia's DNA began its offender database in 1989
- It began to enter felonious arrestee samples in 2003
- Virginia got its first hit on the arrestee database when uploading the first 80 samples
- Since 2003, Virginia has received 3,417 hits
- The database has increased by 66,081 samples since 2003

- Approximately 80% of hits would have been missed if the Databank was limited to only violent offenders.

- Approximately 40% of violent crimes solved were perpetrated by individuals with previous property crime convictions.

We know by reading the statistical success of other states that the larger the DNA database, the greater the number of hits or the greater the number of investigations will be aided by competent evidence. CODIS reports that as of October, 2007 Maryland has:

MARYLAND	
Offender Profiles	46,812
Forensic Samples	4,137
Investigations Aided	868

- Maryland began its offender database in 1994 with the collection of offenders of rape and sex offenses (1st, 2nd and 3rd degrees).

- In 1999 the data base was expanded to include convicted offenders of qualifying violent crimes. In 2002 the database was expanded to include all felonies and the two misdemeanors; 6-205 and 6-206.

- In 2002 we introduced the "all felon" requirement and the Crime Lab quickly became overwhelmed and realized a significant backlog.

- That backlog was just eliminated in 2007 with the completion of 24,300 samples processed which required the filling of all the vacancies within the Biology Section as well as the addition of 2 new positions granted by the Governor.

- Uploading the convicted offender profiles of the back logged samples resulted in an increase of the State's offender profile database by 88%. Subsequently, total hits were increased by 51% over 2006.

- Crime Lab learned a valuable lesson from the backlogs of 1999-2007 and supports the gradual progression of expanding a statewide DNA database.

- We recognize and agree with the State of Virginia's position that "DNA Databanks are most effective with inclusion of at least all felons and applied to all forms of cases" yet we are committed to developing a statewide DNA Database that is efficient, manageable, and reliable.

Conclusion

The supporters of the American criminal justice system have long agreed that we would rather allow 100 guilty men go free than deprive one innocent man of his freedom. That being said, it is my opinion

that it is this body's moral obligation to allow for the expansion of a technology which has proven itself capable of providing the criminal justice system with conclusive evidence of guilt and more importantly, of innocence.

Anticipated Questions

Why include property crimes such as misdemeanor burglary

- Approximately 80% of hits would have been missed if the Databank was limited to only violent offenders.
- Approximately 40% of violent crimes solved were perpetrated by individuals with previous property crime convictions.

Why not all felon arrestee

- There are approximately 800 Criminal Justice Information System felony charges. In 2006, there were approximately 80,000 filings in Maryland Circuit Courts.
- In 2006, Maryland Uniform Crime Reports indicate there were 233,590 index offenses investigated by law enforcement.
- The associated cost would be staggering. $38.00 per sample tested x 200,000 = 7, 600,000 plus additional personnel, plus additional equipment etc...

- Taking either of these numbers into account the caseloads of samples would be unmanageable and re-create a backlog.

What about those released without charges (RWOC) and/or expungement related issues:

- Crime Lab personnel currently have daily and direct access to CJIS. This access allows them to confirm the charge which has been preferred against the person for whom a sample has been received and simultaneously ensure the charge is a qualifying charge as enumerated within the legislation.

Released without charges (RWOC)

- This circumstance predominately occurs in Baltimore City. If this legislation becomes law, DPSCS, Expungement Unit, will add the Maryland State Police Crime Lab to those entities who currently received a daily list of names of persons who were processed through their facilities wherein the person was released without charge(s) (RWOC).

AMICUS CURIAE BRIEF

No. 12-207

In The Supreme Court of the United States

MARYLAND,

Petitioner,

v.

ALONZO JAY KING, JR.,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Maryland

BRIEF OF AMICUS CURIAE NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONER

SCOTT BURNS
NATIONAL DISTRICT ATTORNEYS ASSOCIATION
ALBERT C. LOCHER
Counsel of Record
Assistant District Attorney
COUNTY OF SACRAMENTO, CALIFORNIA
44 Canal Center Plaza, Suite 110
Alexandria, VA 22314
Phone: (703) 549-9222
lochera@sacda.org
Attorneys for Amicus Curiae National District Attorneys Association

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the state may, consistent with the Fourth Amendment, take a buccal (cheek) swab for DNA testing from a person who has been arrested for a felony offense, test the resulting sample, and enter the test results into a DNA database.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST	1
FACTUAL AND PROCEDURAL BACKGROUND	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE LOWER COURTS HAVE SPLIT ON THE ISSUE OF WHETHER TAKING A DNA SAMPLE FROM AN ARRESTEE VIOLATES THE FOURTH AMENDMENT	4
II. FEDERAL AND STATE LAW ENFORCEMENT OFFICIALS WHO RELY ON ARRESTEE DNA SAMPLING SHOULD BE GIVEN THE BENEFIT OF A RULING WHETHER, AND UNDER WHAT CIRCUMSTANCES, THE PRACTICE IS LAWFUL UNDER THE FOURTH AMENDMENT	8
III. THE MARYLAND COURT OF APPEALS RULING THAT ARRESTEE DNA SAMPLING VIOLATES THE FOURTH AMENDMENT IS INCORRECT, AND SHOULD BE REVERSED	11
CONCLUSION	22

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Commonwealth, 274 Va. 469, 650 S.E.2d 702 (Va. 2007), *cert. denied*, 553 U.S. 1054 (2008) 4

District Attorney's Office v. Osborne, 557 U.S. ___, 129 S.Ct. 2308 (2009) 8

Haskell v. Harris, 669 F.3d 1049 (9th Cir. 2012), en banc rehearing granted 686 F.3d 1121 (2012) 6, 7, 20

In re Welfare of C.T.L., 722 N.W.2d 484 (Minn. Ct. App. 2006) 5

King v. State, 425 Md. 550, 42 A.3d 549 (Md. 2012) ..... *passim*

Mario W. v. Kaipo, 637 Ariz. Adv. Rep. 22, 281 P.3d 476 (Ariz. 2012) 5, 14

People v. Buza, 197 Cal.App.4th 1424, 129 Cal.Rptr.3d 753 (2011), hearing granted 262 P.2d 854, 132 Cal.Rptr. 616 (2011) 6, 7, 19

People v. McInnis, 6 Cal.3d 821 (1972) 12

People v. Rankins, 265 N.W.2d 792 (Mich. App. 1978) 12

People v. Scott, 21 Cal.3d 284 (1978) 14

Rochin v. California, 342 U.S. 165 (1952) 14

Schmidt v. City of Bella Villa, 557 F.3d 564 (8th Cir. 2009) 12

United States v. Edwards, 415 U.S. 800 (1974) 12

TABLE OF AUTHORITIES – Continued

Page

United States v. Mitchell, 652 F.3d 387 (3d Cir. 2011) (en banc), *cert. denied*, 132 S.Ct. 1741 (2012) 5

United States v. Pool, 621 F.3d 1213 (9th Cir. 2010), vacated and appeal dismissed 659 F.3d 761 (2011) 6

United States v. Robinson, 414 U.S. 218 (1973) 12

United States v. Weir, 657 F.2d 1005 (8th Cir. 1981) 12

Ward v. State, 903 N.E.2d 946 (Ind. 2009) 12

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Fourth Amendment ..... *passim*

STATUTES

42 U.S.C. § 14132 9

42 U.S.C. § 14135a 9

Louisiana Rev. Stat. § 15.609 9

RULES

California Rule of Court 8.1105(e) 7

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

California Attorney General Press Release, "Brown Releases Study Showing DNA Collected at Arrests Helps Solve Murders, Rapes and Other Violent Crimes," (6/16/2010) 20

California Department of Justice, "Buccal DNA Collection Kit Instructions" 13

Denver District Attorney News Release, "Man Found Guilty in '04 Cold Homicide Case" 10

Epstein, *"Genetic Surveillance" – The Bogeyman Response to Familial DNA Investigations*, 2009 U.Ill. J.L. Tech. & Pol'y 141 (2009) 14

FBI, "High Resolution Buccal Collection Procedure Poster" 13

FBI website, CODIS, NDIS Statistics 9, 10

FBI website, CJIS, Fingerprints & Other Biometrics, IAFIS 18

Bertino, Anthony, *Forensic Science: Fundamentals & Investigations* (2009 Cengage Learning) 8

Kaye, "A Fourth Amendment Theory for Arrestee DNA and Other Biometric Databases," 15 U.Pa.J.Const.L. ___, at ___ (2012), also published as Penn State Univ. Law School, Legal Studies Research Paper No. 7-2012 18

Moss, "DNA – The New Fingerprints," *ABA Journal*, May 1988 issue 8

TABLE OF AUTHORITIES – Continued

Page

Ohio Department of Rehabilitation and Correction, "DNA Sample, Instructions for Using Buccal Collection Kit" 13

Sacramento Bee 911 Blog, "Man Convicted of 1989 Rape-Murder of Sacramento Woman," (9/27/2010) 20

Santa Rosa Press Democrat, "Brothers Face Trial in Santa Rosa Abduction, Rape Case," (1/8/2010) 20

Santa Rosa Press Democrat, "Santa Rosa Man Gets Life for Series of Rapes," (9/29/2010) 21

Steffen and Mitchell, "Suspect in 2004 Slaying in Colorado Arrested in California," *Denver Post*, 8/3/2011 10

Wambaugh, *The Blooding*, (Random House 1989; Bantam Books 1995) 8

Webmed.com, "The Truth About Healthy Teeth: Your Guide to at-home Dental Care" 14

STATEMENT OF INTEREST[1]

This brief is submitted by the National District Attorneys Association (NDAA), as amicus curiae in support of petitioner the state of Maryland.

The NDAA is the largest and primary professional association of prosecuting attorneys in the United States. The association has approximately 7,000 members, including most of the nation's local prosecutors, assistant prosecutors, investigators, victim witness advocates, and paralegals. The mission of the association is, "To be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people." NDAA provides professional guidance and support to its members, serves as a resource and education center, produces publications, and follows and addresses public policy issues involving criminal justice and law enforcement.

This case raises matters of concern to prosecutors and law enforcement professionals nationwide. The decision by this Court whether to grant certiorari concerns a point of law where lower courts have reached

---

[1] Pursuant to Supreme Court Rule 37.2(a), amicus gave counsel of record for each party written notice of the intention of amicus to file this brief at least 10 days in advance, and all parties have consented in writing to the filing of this brief. Pursuant to Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, and that no entity or person, other than amicus, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief.

conflicting rulings, affecting how arrested subjects are processed, what biological or biometric samples may be taken from those subjects, and what investigative use may be made of those samples. A decision by this Court will provide a uniform rule affecting whether arrested subjects can be identified through DNA samples taken at arrest, including their identification as perpetrators of crimes, and whether subjects so identified may be brought to justice for past crimes, and prevented from committing future crimes.

Amicus has expertise in the matters pending before the Court in this case, and believes that this brief will be helpful to this Court in its consideration of these matters.

FACTUAL AND PROCEDURAL BACKGROUND

In 2003, a stranger wearing a hat and a scarf over his face broke into the home of Vonette W. and raped her. She promptly reported the assault, and submitted to a rape exam. A semen sample was collected and subjected to DNA analysis, which led to a DNA profile of the rapist. The profile was entered into the Maryland state DNA database, at first without result.

In 2009, respondent Alonzo King was arrested on unrelated assault charges. Pursuant to Maryland law, a DNA sample was taken by means of a cheek, or buccal swab. The analysis of that sample produced a DNA profile that was also entered into the Maryland

DNA database, and was found to match the sample from the rape of Vonette W. Charged with the crime, King moved to suppress the results of the arrest DNA sampling. The motion was denied. King submitted his trial to a judge on an agreed statement of facts, and was convicted.

On appeal, the Maryland Court of Appeals ruled that the arrest DNA sampling of King violated the Fourth Amendment, and reversed the rape conviction. That ruling is now before this Court on petition for writ of certiorari.

SUMMARY OF ARGUMENT

The issue presented by this case is whether a subject who has been arrested for a felony offense, but not convicted, may be subject to the taking of a DNA sample from his person without a search warrant, in the same manner that arrested persons are photographed and fingerprinted. Lower courts have split on this question, making the matter appropriate for review by this Court to resolve the issue. Nationwide, law enforcement officials and crime lab personnel devote resources to obtaining arrestee DNA samples, analyzing them, entering the results into a nationwide databank called the "Combined DNA Index System," or CODIS. Forensic samples from unsolved crimes are then entered into CODIS to search for whether there is a match to a known offender who has been entered into the system. Law enforcement,

crime lab, and prosecution officials should be given guidance whether, and under what circumstances, this work to identify and bring justice to guilty perpetrators may continue. The Maryland Court of Appeals erred when it ruled that taking the arrest DNA sample violated the Fourth Amendment. Taking a DNA sample at arrest is minimally intrusive, comparable to other accepted arrest procedures such as fingerprinting and photographing, and serves an important public and governmental interest. Therefore it is reasonable under the Fourth Amendment.

ARGUMENT

I. THE LOWER COURTS HAVE SPLIT ON THE ISSUE OF WHETHER TAKING A DNA SAMPLE FROM AN ARRESTEE VIOLATES THE FOURTH AMENDMENT.

Putting aside rulings at the trial court level, there are currently published appellate rulings from United States Circuit Courts of Appeals, from the highest court in different states, and from intermediate state appellate courts, that conflict on the constitutional rule at issue in this case.

Cases Ruling Seizure Legal – The following cases have held that it is not a search and seizure violation under the Fourth Amendment for a DNA sample to be taken upon arrest:

- *Anderson v. Commonwealth*, 274 Va. 469, 650 S.E.2d 702 (Va. 2007), *cert. denied*,

553 U.S. 1054 (2008). The Virginia Supreme Court unanimously affirmed the ruling of the Virginia Court of Appeals, which was reported at 48 Va.App. 704, 634 S.E.2d 372 (Va. 2006).

- *United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011) (en banc), *cert. denied*, 132 S.Ct. 1741 (2012). The Third Circuit, sitting en banc, ruled by a vote of 8-6 that arrestee DNA sampling did not violate the Fourth Amendment.

Cases Ruling Seizure Illegal – The following cases have held that taking a DNA sample upon arrest is a search and seizure violation under the Fourth Amendment:

- *In re Welfare of C.T.L.*, 722 N.W.2d 484 (Minn. Ct. App. 2006). The Minnesota Court of Appeals unanimously (3-0) held that requiring an arrestee to provide a DNA sample before conviction and without a search warrant violated the Fourth Amendment.

- *King v. State*, 425 Md. 550, 42 A.3d 549 (Md. 2012). This is the case at bar, in which the Maryland Court of Appeals (the highest court in that state) ruled (5-2) that taking an arrestee DNA sample violated the Fourth Amendment.

- *Mario W. v. Kaipo*, 637 Ariz. Adv. Rep. 22, 281 P.3d 476 (Ariz. 2012). The Arizona Supreme Court ruled (5-2) that arrest DNA of a juvenile violates the Fourth

Amendment. This case reversed the Arizona Court of Appeals, which had upheld taking the sample in a split ruling (2-1). See 265 P.3d 389 (Ariz. App. 2011).

In addition to the above cases, the following three cases have addressed the matter in reported appellate opinions, which for the reasons described have not become or did not become final:

- *United States v. Pool*, 621 F.3d 1213 (9th Cir. 2010). A three judge panel of the Ninth Circuit held (2-1) that an arrestee DNA sample ordered as condition of pretrial release did not violate the Fourth Amendment. The Ninth Circuit then granted a rehearing en banc, at 646 F.3d 659. Before the en banc hearing, the prosecution and the defendant reached a plea disposition in the District Court, after which the appeal was dismissed as moot. See 659 F.3d 761 (2011).

- *Haskell v. Harris*, 669 F.3d 1049 (9th Cir. 2012). A three judge panel of the Ninth Circuit upheld (2-1) arrestee DNA sampling as lawful under the Fourth Amendment. The Ninth Circuit granted a rehearing en banc at 686 F.3d 1121. At this writing, oral argument is scheduled for September 19, 2012.

- *People v. Buza*, 197 Cal.App.4th 1424, 129 Cal.Rptr.3d 753 (2011). The California Court of Appeal for the First Appellate District, Division Two, ruled (3-0)

> that requiring a felony arrest subject to provide a DNA sample before conviction violated the Fourth Amendment. On October 19, 2011, the California Supreme Court unanimously voted to grant review. 262 P.2d 854, 132 Cal.Rptr. 616 (2011). That action effectively vacates and depublishes the Court of Appeal opinion, rendering it of no precedential value. California Rule of Court 8.1105(e). At this writing, the case has been fully briefed in the California Supreme Court, but is not yet set for oral argument.

As the foregoing clearly demonstrates, the issue here represents a classic circumstance of a split in rulings by the lower courts. No matter what result the en banc panel of the Ninth Circuit reaches in *Haskell*, or the California Supreme Court reaches in *Buza*, the final decisions in those cases will only add to the already existing split.

The disagreement in the existing, final appellate opinions, and the split within those courts which have considered the issue, all indicate that the matter is not likely to be resolved by the lower courts reaching a consensus. The point is ripe for consideration and resolution by this Court.

II. FEDERAL AND STATE LAW ENFORCEMENT OFFICIALS WHO RELY ON ARRESTEE DNA SAMPLING SHOULD BE GIVEN THE BENEFIT OF A RULING WHETHER, AND UNDER WHAT CIRCUMSTANCES, THE PRACTICE IS LAWFUL UNDER THE FOURTH AMENDMENT.

DNA analysis was first used in a forensic setting in Great Britain in 1986-87, in the same case exonerating an innocent suspect and identifying the guilty one.[2] In November 1987, Tommie Lee Andrews became the first person in the United States convicted of a crime (rape) based on DNA evidence.[3] In the quarter century since, DNA analysis has become one of the most important crime investigation tools ever developed. As this Court has since recognized, "DNA testing has an unparalleled ability both to exonerate the [innocent] and to identify the guilty." *District Attorney's Office v. Osborne*, 557 U.S. ___, 129 S.Ct. 2308, at 2310 (2009). Arrestee DNA has become a valuable application for this technology.

---

[2] The rape murders in 1983 and 1986 of 15-year-old Lynda Mann and 15-year-old Dawn Ashworth in Leicestershire County, England; the exoneration of suspect Richard Buckland; and the identification and conviction of Collin Pitchfork in 1987. For a general account of the investigation, see Wambaugh, *The Blooding* (Random House 1989; Bantam Books 1995).

[3] Bertino, Anthony, *Forensic Science: Fundamentals & Investigations* (2009 Cengage Learning), p. 170; Moss, "DNA – The New Fingerprints," *ABA Journal*, May 1988 issue, p. 66.

The DNA Identification Act of 1994 (42 U.S.C. § 14132) authorized the FBI to operate the Combined DNA Index System, or CODIS, accepting DNA profiles from federal, state and local laboratories meeting certain qualifications. In its early stages, DNA samples only came from persons convicted. The first state to authorize the taking of arrestee DNA samples was Louisiana in 1997. LA Rev. Stat. § 15.609. A 2005 amendment to the federal law (P.L. 109-162, amending 42 U.S.C. § 14132, 14135a), allowed CODIS to accept arrestee DNA profiles from those states which collect and analyze it. Now, at least 27 states and the federal government have adopted arrestee DNA sampling. As of July 2012, CODIS contained nearly 1.2 million arrestee DNA samples, along with 9.8 million offender DNA profiles. See FBI website, CODIS, NDIS Statistics, http://www.fbi.gov/about-us/lab/codis/ndis-statistics.[4]

CODIS also accepts DNA profiles developed from forensic samples (i.e., crime scene evidence, rape exam evidence, etc.), with the purpose of attempting to identify perpetrators of unsolved crimes, with over 441,200 forensic samples as of July 2012, which come from 24 different states, plus from federal sources. Id. Due to the nationwide nature of the system, a state or local agency will often rely on the DNA profiles provided from agencies all over the country. Arrestee

---

[4] This website citation, and all website citations following, were last viewed on September 11, 2012.

DNA samples have proved their value in solving cases across state lines. The CODIS system has produced over 185,000 hits, assisting in more than 177,500 investigations. Id.

One real life example is the case of *People v. Billy Jene Wilson*, Denver District Court No. 11 CR 20001. On August 21, 2004, the body of Gina Gruenwald was found in Denver, where she had been stabbed twice in the neck. Following investigation no immediate arrest was made, but a DNA sample recovered from her body was analyzed for a profile, and entered into CODIS. In February 2011, Billy Jene Wilson was arrested for felony grand theft in San Francisco. Under California law, an arrestee DNA sample was taken, analyzed, and entered into CODIS. Wilson's DNA profile matched the DNA sample from Gina Gruenwald's body. He was arrested in San Francisco and extradited to Colorado, where he was tried and convicted of felony murder, second degree murder, and attempted sexual assault. See Steffen and Mitchell, "Suspect in 2004 Slaying in Colorado Arrested in California," *Denver Post*, 8/3/2011; Denver District Attorney News Release, "Man Found Guilty in '04 Cold Homicide Case," available online at http://www.denverda.org/News_Release/Releases/2012%20Release/Wilson%20Conviction.pdf.

Law enforcement and crime lab personnel from around the country expend time and resources collecting and analyzing arrestee DNA, then solving crimes like the murder of Gina Gruenwald. The entire basis of that work is challenged by the claim

respondent makes here, and by rulings such as the one made by the Maryland Court of Appeals in this case. The case at bar provides the appropriate vehicle for this Court to provide guidance for law enforcement, crime labs and prosecutors nationwide as to whether this work can continue bringing criminals to justice and safety to the public.

III. THE MARYLAND COURT OF APPEALS RULING THAT ARRESTEE DNA SAMPLING VIOLATES THE FOURTH AMENDMENT IS INCORRECT, AND SHOULD BE REVERSED.

In the case at bar, the Maryland Court of Appeals reviewed the published case law on the topic (see *King*, supra, 425 Md. at 573-593, 42 A.3d at 563-575). It then ruled under the "totality of the circumstances" test, balancing the intrusion on respondent's privacy against the government interests served. The court concluded that the governmental interest of identifying arrested persons, both in terms of who the person is, and also the person's criminal conduct, did not outweigh the intrusion on the privacy interest of the individual occasioned by the warrantless seizure of his DNA by taking a cheek swab sample. *King*, supra, 425 Md. at 594-603, 42 A.3d at 576-581. With all due respect to the majority justices on the Maryland court, this ruling does not properly balance the interests at issue, and should be reversed.

The touchstone of Fourth Amendment search and seizure analysis, which finds its source in the constitutional language, is the reasonableness of the search. Citing the reasonableness of minimally intrusive procedures, courts have permitted a wide variety of routine measurements, observations, and minimal searches respecting persons who are booked as part of a custodial arrest. An arrested subject has a reduced expectation of privacy which permits him or her being photographed, as well as the taking of other identifying measures such as the observation and recording of height, weight, hair color, eye color, and fingerprinting, and disrobing to disclose scars or tattoos. See e.g. *United States v. Robinson*, 414 U.S. 218 (1973) (search of the person incident to custodial arrest); *United States v. Edwards*, 415 U.S. 800 (1974) (same); *United States v. Weir*, 657 F.2d 1005 (8th Cir. 1981) (hair sample on arrest); *Ward v. State*, 903 N.E.2d 946 (Ind. 2009) (same); *People v. Rankins*, 265 N.W.2d 792 (Mich. App. 1978) (same); *People v. McInnis*, 6 Cal.3d 821, at 825-826 (1972) (booking photo); *Schmidt v. City of Bella Villa*, 557 F.3d 564, at 572-574 (8th Cir. 2009) (photograph of tattoo under clothing during booking).

The procedure at issue here should be analyzed in comparison to those traditionally allowed with respect to arrested subjects. The modern buccal swab process for taking a DNA sample represents a minimal intrusion. It involves the collection of epithelial cells from the inner surface of the cheek. The cells are captured with a collection device, which may be a

simple cotton swab, or a plastic device, similar in size and shape to a popsicle stick, which has one surface with specialized paper, fabric, or foam rubber. The collection device is rubbed several times against the inner surface of the cheek. It is no more intrusive and takes less time than brushing one's teeth, or taking a full set of fingerprints. Written instructions from three different agencies (California State Department of Justice, Ohio Department of Rehabilitation and Correction, and the FBI) describing the process can be found on-line:

> http://ag.ca.gov/bfs/pdf/collection_kit.pdf (California Department of Justice, Buccal DNA Collection Kit Instructions)
>
> http://www.drc.ohio.gov/web/drc_policies/documents/52-RCP-05.pdf (Ohio Department of Rehabilitation and Correction, DNA Sample, Instructions for Using Buccal Collection Kit)
>
> http://www.fbi.gov/about-us/lab/dna-nuclear/image/high-resolution-buccal-collection-procedure-poster/view (FBI, High Resolution Buccal Collection Procedure Poster)

Two training videos demonstrating the taking of a buccal swab for a DNA sample (with the collection device in the mouth for less than 10 seconds) can be found online at:

> http://www.youtube.com/watch?v=tFQKYzQZ0yE&feature=related
>
> http://www.youtube.com/watch?v=R4FCz7pQexA&feature=related

Reviewing these materials, it is not surprising that buccal swab DNA sampling has been called "perhaps the least intrusive of all seizures." Epstein, *"Genetic Surveillance" – The Bogeyman Response to Familial DNA Investigations*, 2009 U.Ill. J.L. Tech. & Pol'y 141, at 152 (2009). The Arizona Supreme Court, in *Mario W.*, supra, while ultimately ruling that arrestee DNA samples could not be analyzed and uploaded into a database, conceded that, "The intrusion on an arrestee's privacy interests in the swiping of a swab to obtain buccal cells is not significantly greater than fingerprinting." 281 P.3d at 481. When evaluating the de minimis nature of this procedure, it is not facetious to compare it to a real world, every day example – dental health professionals recommend brushing teeth two or more times per day, for at least two minutes each session.[5]

The procedure at issue here does not even approach the outrageous bodily intrusions prohibited under such cases as *Rochin v. California*, 342 U.S. 165 (1952) (forcible administration of an emetic by way of a stomach tube, to induce vomiting in order to recover narcotics evidence), or *People v. Scott*, 21 Cal.3d 284 (1978) (forcible manipulation of the prostate by digital rectal means to obtain sample for STD testing). The minimal intrusion of a buccal swab – taking less time than fingerprinting or brushing the

---

[5] See "The Truth About Healthy Teeth: Your Guide to at-home Dental Care," published at http://www.webmd.com/oral-health/healthy-teeth-10/brushing-teeth-mistakes.

teeth, and no more intrusive than the latter – can hardly be considered unreasonable, especially when measured against the significant interests at stake.

The Maryland Court of Appeals majority considered and rejected the analogy between taking a DNA sample and taking fingerprints, in part based on the claim that while the DNA loci used for identification purposes, which under current scientific knowledge have no known biological purpose, the DNA buccal swab "contains within it unarguably much more than a person's identity. . . . [but also] a vast genetic treasure map. . . . " *King v. State*, supra, 425 Md. at 596, 45 A.3d at 577. But the DNA sample is not analyzed for this supposed treasure map, or in any manner that will uncover the "treasure." Rather, forensic DNA analysis looks only at genetic loci (genes) that have no known biological purpose. It is the profile derived from the analysis of these genes that is entered into the CODIS database.

The Maryland statute, like other DNA arrestee sampling statutes, provides strict prohibitions against use of the arrestee's DNA for any purpose other than identification. The Maryland court majority acknowledged, but then discounted, that fact. See 425 Md. at 596, 45 A.3d at 577. It also failed to recognize a simple judicial solution to the use of the DNA sample for purposes other than identification – prohibit other uses if they are improper, but do not prohibit the use of the DNA for identification. The overreaching and unnecessary solution proposed by respondent and the Court of Appeals majority is to prohibit the taking of

the DNA altogether so that it cannot be used for any purpose, throwing out the baby with the bath water.

While the Maryland court majority discounted the analogy between taking a buccal swab and taking fingerprints, their analysis ignores the reality of both items (fingerprints and cheek swabbing) and the processes used to sample each. The majority observed, correctly, that fingerprints are physical sets of ridges on the skin of a person's fingers. 425 Md. at 595, 42 A.3d at 576. However, fingerprints cannot be used for identification purposes simply by looking at a person's fingers.

The traditional method of taking a fingerprint sample involves the examiner inking the tips of each of the subject's fingers, then holding each finger, one at a time, and rolling it across the surface of a white card, to leave an ink image of the finger ridge impressions. Videos showing how fingerprints are rolled for ink prints can be viewed online at:

http://www.youtube.com/watch?v=d7N-4UNAzsw

http://www.youtube.com/watch?v=Yh8hXrPO0k4&feature=related

Modern technology, adopted by some agencies, allows the examiner to forego the use of ink when using an electronic device with a glass surface, from which the fingerprints are scanned electronically. Even this technology, however, requires the examiner to hold and manipulate the subject's hands and

fingers in the same manner as the taking of inked prints:

> http://www.youtube.com/watch?v=YX68sxEyjYc&feature=related

Even with the inkless, electronic scan method, the subject's hands and each finger are handled, controlled and manipulated by the officer taking the prints, taking approximately one minute – more time than taking a buccal swab (as illustrated by the websites referenced above). Using ink to roll fingerprints onto a white fingerprint card, the process takes even longer.

In short, the Maryland court majority ignored the reality that fingerprinting involves an equal or greater intrusion on the person, in terms of time, and handling or controlling parts of the body of the subject, than does taking a buccal swab. And it conflated the invasion of privacy into a vast treasure hunt into all of the subject's DNA, a treasure hunt that does not take place.

The Maryland court majority also relied heavily on the point that a DNA sample may be used for crime investigation purposes (and indeed was so used in respondent's case). 425 Md. at 595, 598-599; 42 A.3d at 576, 578-579. But the same is true for fingerprint cards. The FBI operates the Integrated Automated Fingerprint Identification System, or IAFIS, which stores not only inked or electronically recorded fingerprints from known subjects, but also is used for the search and comparison of latent (i.e., crime scene)

fingerprints to the repository of known fingerprints. The FBI plainly states that part of the function of IAFIS is to "solve and prevent crime." See FBI website, CJIS, Fingerprints & Other Biometrics, IAFIS, available online at: http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis. Latent crime scene prints entered into IAFIS are subject to further analysis and pattern matching, via computer, just as CODIS does for DNA. See Kaye, "A Fourth Amendment Theory for Arrestee DNA and Other Biometric Databases," 15 U.PA.J.Const.L. ___, at ___ (2012), also published as Penn State Univ. Law School, Legal Studies Research Paper No. 7-2012, at p. 6. Hits of crime scene prints matching known subject prints in IAFIS come to approximately 50,000 per year. Id.

The Maryland court's distinction between the taking and analysis of fingerprints on the one hand, and DNA samples on the other, is not convincing. Indeed, the Maryland majority recognized the conflict between allowing fingerprinting at booking, and disallowing DNA sampling at booking, when it noted that "neither of these techniques [photographing and fingerprinting at booking] has undergone definitive Fourth Amendment scrutiny." 425 Md. at 596, 42 A.3d at 577. The fact that the Maryland court majority cannot convincingly articulate a theoretical underpinning for prohibiting DNA arrestee sampling (and its use in a searchable database) that distinguishes the practice from taking photographs and fingerprints at booking (which are also used for investigation purposes), demonstrates that the Maryland

Court of Appeals has strayed off course in assigning the weight to be given to Fourth Amendment privacy concerns with respect to DNA sampling. Following the path taken by the Maryland court would logically lead to disallowing booking photographs and fingerprints for investigation purposes.[6]

Weighed against the slight intrusion of a cheek swab on the arrested subject's privacy interest, the government's interest is substantial. As noted above, the CODIS system has produced over 185,000 hits, assisting in more than 177,500 investigations. Turning that bare statistic into real cases with real victims, we find such cases as the Denver murder of Gina Gruenwald by Billy Jene Wilson, solved by the arrest DNA sample taken in San Francisco years later, as described in section II above. We also find many other cases, including:

- *People v. Donald Carter*, Sacramento Superior Court No. 09F05363 – In May 1989, 80 year old Sophia McAllister was found murdered in her Sacramento home. A DNA sample from the crime was entered into CODIS, without immediate results. In 2009, Donald Carter was arrested on felony drug charges, and a DNA sample was taken. When entered into CODIS, Carter's DNA matched the

---

[6] The California Court of Appeal in *People v. Buza*, supra, spent even more time questioning the basis for allowing routine fingerprinting at arrest. See 197 Cal.App.4th at 1445.

forensic sample from the McAllister murder. The case proceeded to trial, and Carter was convicted of rape and murder. See *Haskell v. Harris*, supra, 669 F.3d at 1064; *Sacramento Bee 911 Blog*, "Man Convicted of 1989 Rape-Murder of Sacramento Woman," (9/27/2010); Attorney General Press Release, "Brown Releases Study Showing DNA Collected at Arrests Helps Solve Murders, Rapes and Other Violent Crimes," (6/16/2010), published online at http://oag.ca.gov/news/press_release?id=1936;

- *People v. Rogelio Zaragoza*, Sonoma Superior Court Nos. SCR 572377 and SCR 565937 – In 2006, Rogelio Zaragoza and two other men picked up a woman in Santa Rosa, took her to a vineyard area, and raped her. There was no immediate arrest, but a forensic DNA sample was recovered from the victim, and uploaded into CODIS. In 2009, Rogelio Zaragoza and his brother kidnapped a woman from a Santa Rosa street at knife point, and drove her away, leading to a high speed pursuit by California Highway Patrol officers. The brothers got out of the car and fled on foot, but were apprehended. A DNA sample taken from Rogelio Zaragoza after the 2009 arrest was entered into the CODIS database, and matched the 2006 assault. He was convicted of the 2006 rape at jury trial, and has been sentenced. See *Santa Rosa Press Democrat*, "Brothers Face Trial in Santa Rosa

Abduction, Rape Case," (1/8/2010), published online at http://www.pressdemocrat.com/article/20100108/ARTICLES/100109559?p=1&tc=pg; *Santa Rosa Press Democrat*, "Santa Rosa Man Gets Life for Series of Rapes," (9/29/2010), published online at http://www.pressdemocrat.com/article/20100929/ARTICLES/100929399

Of course, also included among the cases solved by arrestee DNA samples, we find the respondent, a rapist caught when his DNA sample was taken after his unrelated arrest for another assault.

These are but a few of the cases where arrestee DNA sampling, and CODIS, have brought offenders to justice, brought closure to victims and their families, and protected the public by preventing future crimes.

Weighed in the balance against the slight intrusion involved in the simple taking of a cheek swab, this governmental interest is weighty and substantial. Like photography and fingerprinting before it, DNA sampling at arrest has taken its place as a brief and minor imposition on the arrested subject that provides significant benefits to society. With no more invasion of the person than is involved with brushing the teeth, murderers, serial rapists and other criminals are brought to justice. The Maryland Court of

Appeals, in ruling for respondent, erroneously balanced the constitutional interests at stake.

CONCLUSION

Based on the foregoing, as well as the reasons put forth in the petition for certiorari, amicus curiae respectfully requests that this Court grant certiorari, and reverse the decision of the Maryland Court of Appeals.

DATED: September 17, 2012

Respectfully submitted,

ALBERT C. LOCHER
Counsel of Record
Attorney for Amicus Curiae
National District
Attorneys Association

JOINT APPENDIX

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
DEC 26 2012
OFFICE OF THE CLERK

No. 12-207

IN THE
Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

ALONZO JAY KING, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

JOINT APPENDIX

DOUGLAS F. GANSLER
Attorney General of Maryland

KATHERINE WINFREE
Chief Deputy Attorney General
BRIAN S. KLEINBORD*
ROBERT TAYLOR, JR.
Assistant Attorneys General

Office of the
Attorney General
200 Saint Paul Place
Baltimore, MD 21202
(410) 576-6435
bkleinbord@oag.state.md.us
Counsel for Petitioner
**Counsel of Record*

KANNON K. SHANMUGAM*

JAMES M. MCDONALD
DAVID M. HORNIAK
Williams & Connolly LLP

725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000
KShanmugam@wc.com

Counsel for Respondent

PETITION FOR CERTIORARI FILED AUGUST 14, 2012
CERTIORARI GRANTED NOVEMBER 9, 2012

Library of Congress
Law Library

TABLE OF CONTENTS

Page

Chronological List of Relevant Docket Entries in first degree rape case, No. 22-K-09-00807. . . . . JA 1-3

Chronological List of Relevant Docket Entries in first degree assault case, No. 22-K-09-000428. . . . . JA 4-5

Transcript of suppression hearing dated February 12, 2010 . . . . . JA 6-44

Memorandum of Law filed by counsel for Respondent dated February 23, 2010 . . . . . JA 45-46

Memorandum Opinion of Circuit Court for Wicomico County dated February 26, 2010 . . . . . JA 47-55

Transcript of suppression hearing dated March 26, 2010 . . . . . JA 56-82

Opinion of Court of Appeals of Maryland dated April 24, 2012 . . . . . JA 83-166

Temporary Stay of Decision,
of Court of Appeals of Maryland,
The Chief Justice as Circuit Justice,
No. 12A48 dated July 18, 2012 . . . . . JA 167

Opinion and Order Granting Stay
Pending Appeal, The Chief Justice
as Circuit Justice dated July 30, 2012. . . JA 168-71

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Circuit Court for Wicomico County
Case Number 22-K-09-000807:

Calendar of Events

November 6, 2009	—	Initial Appearance.
November 6, 2009	—	Bail review.
February 12, 2010	—	Criminal Motions.
February 12, 2010	—	Hearing.
March 26, 2010	—	Criminal Motions.
April 7, 2010	—	Hearing.
July 15, 2010	—	Competency Hearing.
July 27, 2010	—	Criminal Non-Jury Trial.
October 7, 2010	—	Sentencing Hearing.

Counts and Sentencing

Count	Off.Date	Statute	Disp./Plea/Verdict[1]
01	9/21/03	Burglary-First Deg.:	NP
02	9/21/03	Burglary-Third Deg.:	NP
03	9/21/03	Rape First Deg.:	G
			LIFE [sentence] [to commence 11/6/09]

Court recommends Defendant be considered for Patuxent Center for mental and sex offender treatment.

04	9/21/03	Attempt-1st Deg. Rape:	NP
05	9/21/03	Rape 2nd Deg.:	NP
06	9/21/03	Attempt 2nd Deg. Rape:	NP
07	9/21/03	Armed Robbery:	NP
08	9/21/03	Robbery:	NP
09	9/21/03	Handgun Use/ Felony/Violent Crime:	NP

---

[1] The following docket codes are used: NP - nolle prosequi; G - guilty; N/A - Not Guilty Agreed Statement of Facts; AP - *Alford* Plea.

10	9/21/03	Wear, Carry & Transp. Handgun Upon Their Person: NP

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Circuit Court for Wicomico County
Case No. 22-K-09-000428:

Calendar Events

June 19, 2009 - Initial Appearance.

August 14, 2009 - Criminal Motions.

August 14, 2009 - Hearing.

August 28, 2009 - Criminal Motions.

Counts and Sentencing

01	4/10/09	Assault-1st Deg:	NP
02	4/10/09	Assault-1st Deg:	NP
03	4/10/09	Assault-1st Deg:	NP
04	4/10/09	Assault-1st Deg:	NP
05	4/10/09	Assault-2nd Deg:	G/AP
			Years
April 10, 2009 - Sentence			4
		Suspended	3
		UnSuspended	1
06	4/10/09	Assault-2nd	

		Deg:	NP
07	4/10/09	Assault-2nd	
		Deg:	NP
08	4/10/09	Assault-2nd	
		Deg:	NP
09	4/10/09	Reckless	
		Endanger:	NP
10	4/10/09	Reckless	
		Endanger:	NP
11	4/10/09	Reckless	
		Endanger:	NP
12	4/10/09	Reckless	
		Endanger:	NP
13	4/10/09	Dangerous	
		Weapon:Wear	
		& Carry With	
		Int. to Injure:	NP

IN THE CIRCUIT COURT FOR
WICOMICO COUNTY, MARYLAND

STATE OF MARYLAND, *

vs. * Criminal Docket

ALONZO JAY KING, JR., * No. K09-0807

Defendant

_____/

REPORTER'S OFFICIAL TRANSCRIPT
OF PROCEEDINGS

Salisbury, Maryland
February 12, 2010

BEFORE:

The Honorable Kathleen L. Beckstead, Judge

APPEARANCES:

On behalf of the State of Maryland:
Elizabeth Ireland, Esquire

On behalf of the Defendant:
James J. Podlas, Esquire

REPORTED STENOGRAPHICALLY BY:
Valerie M. Dawson, RMR
Official Court Reporter
410-548-4938

[3] PROCEEDINGS
(February 12, 2010)

MS. IRELAND: The State calls the case of Alonzo King, K09-0807, set for motions today.

THE COURT: Good morning, Mr. Podlas.

MR. PODLAS: Mr. King is on his way out.

MS. IRELAND: Your Honor, we are set for motions today. I want to alert the Court at the outset that there may be a need, at least from the State's perspective, to bifurcate this. And I've talked briefly with Mr. Podlas about that, and since he indicated that he would not be in a position to agree to that, I may need to lay out the factors upon which the State would rely on its request to bifurcate this motions hearing.

But at this juncture, I'm still not clear, though I've attempted to get some precision from Mr. Podlas as to what our motions are, I did receive an e-mail from him on February 9th identifying issues, which I may not be able to respond to completely.

So, depending on what his position is and what his motions are today, if I could respectfully request a proffer, then I could let the Court know if I need to request that this hearing potentially be bifurcated.

[4] THE COURT: Well, let me see if I may... the trial date is March 2nd, 2010.

MS. IRELAND: That's correct. And there will be a need to postpone that because we just received the DNA results and Mr. Podlas indicated that he would be needing a continuance and the State will be obligated to give him that because of the statute, it's a DNA issue.

THE COURT: All right. So, whatever issues may not be resolved today potentially in the, except for the DNA challenge, could be resolved on March 2nd, 2010.

MS. IRELAND: Yes.

THE COURT: Very good.

Mr. Podlas.

MR. PODLAS: Judge, let me, if I could, just address this issue of bifurcation.

THE COURT: Sir, why don't you make yourself comfortable and be seated?

Counsel, if you are not addressing the Court, feel free also to be seated.

Mr. King, you're Alonzo Jay King, Jr.?

THE DEFENDANT: Yes, ma'am.

THE COURT: You may make yourself comfortable.

[5] Yes, Mr. Podlas.

MR. PODLAS: Judge, this motion is already at a postponed date, it was originally scheduled for January 22nd. And it was postponed on January 22nd at the request of the State over the objection of the Defendant.

With respect to the issues on this motion, the issues on this motion have to do with the suppression, primarily the suppression of the DNA, and Counsel has basically made that issue clear to Ms. Ireland a number of times.

THE COURT: Because I am not an expert in the area of DNA, could you tell me for my benefit what it is that you are asserting would require a suppression of the DNA in this case?

MR. PODLAS: Okay. Perhaps, if I could, Judge, just to give a short sketch of the outline of the case.

THE COURT: Okay. Do you need me to sequester witnesses before we take argument on this point?

MR. PODLAS: I don't think so for this portion, Judge.

THE COURT: All right.

MS. IRELAND: No, Your Honor.

[6] MR. PODLAS: About six and a half years ago, the victim in this matter was allegedly raped and robbed at gunpoint. There was no identification as to the perpetrator. Last August Mr. King was arrested and

charged with those crimes. That arrest was based on a cold hit in the CODIS system in the statewide DNA data base.

It is our position with respect to the motions, first, that the arrest of Mr. King based on that was an unconstitutional arrest, but beyond that with respect to the DNA issue, Mr. King asserts that there wasn't any DNA taken from him; but be that as it may, the State is alleging that they have taken this DNA in accordance with the DNA Collection Act as amended effective January 1st, 2009. It's our position that the DNA was taken, not in accordance with that Act, that it constitutes an unreasonable and illegal search, and that all DNA evidence with respect to and arising from that collection should be suppressed.

And then, thirdly —

THE COURT: So, let me see if I can stop you, just so I make sure I'm following, the Defendant says it's not his DNA, isn't that what you just told me?

[7] MR. PODLAS: The Defendant indicates to me that it is not his DNA. That's a factual issue.

THE COURT: Okay. And then, so for purposes of having the State present the foundation for the collection of DNA, you're also asserting that the collection process was defective how?

MR. PODLAS: What I'm asserting, Judge, is this. The taking of DNA is a search. That's settled law. It's an unreasonable search unless it's done in accordance

with law. They're asserting that it was done in accordance with the DNA Collection Act as amended. That's their burden to show.

THE COURT: Okay. So you're going to assert here today that, before allowing, that at a suppression hearing you can simply say the State is unable to prove that this DNA was collected pursuant to a lawful authorization and then sit down and let the State prove that it was, right? And that you would have no affirmative obligation to do anything.

MR. PODLAS: That's correct.

THE COURT: All right.

MR. PODLAS: That's correct. And just to make the record complete, the third basis is that, even if the Court were to find that those requirements were met, it's our position that the [8]collection of the DNA is a violation of Fourth Amendment rights, notwithstanding the opinion of the Court of Appeals in the Raines case, because that opinion was rendered in 2004 prior to the amendment of the statute that went into effect on January 1st of 2009, and made a substantial change in the law, whereby prior to January 1st, 2009, collection can only take place when someone was convicted of certain felonies, and the change that was effected in 2009 allowed it to be collected based on the filing of charges. And we can get into that, that is a legal argument we get into later on.

THE COURT: So there would be absolutely no factual foundation required as to the legality of the

amended DNA collection law and its effect; is that what you are saying?

MR. PODLAS: Should the Court find that it was collected in accordance with the Act. And, again, that's the State's burden.

THE COURT: Okay. But as to the legal argument about the legality of the process that was adopted by the legislature, there would be no factual foundation for that --

MR. PODLAS: No, that's purely a legal argument, Judge.

[9] THE COURT: All right. That's what I inferred. Okay.

So, the challenge is, as I understand it, it's not his DNA, the State has the burden of proving that it is, and the collection process is a process which the State is required to affirmatively establish in order to justify a search of the Defendant and the collection of his DNA, and therefore the defense is challenging the legality of the search and the seizure of DNA, and requiring the state to establish affirmatively that the collection process was followed.

Is that right?

MR. PODLAS: Yes, Judge. And the other point which I made at the beginning, is that the arrest of the Defendant was an illegal seizure because it's not sanctioned, or it's, it's an unreasonable, it's an

unlawful seizure because it is not allowed under the DNA Collection Act, and that's the only basis upon which he was arrested.

THE COURT: So the arrest of the Defendant was unlawful because it was based on DNA alone?

MR. PODLAS: Yes, and the DNA Collection Act says that the only use that can be made of a sample even if it's taken legally is to provide probable [10]cause for a warrant.

THE COURT: Okay. But isn't that what an arrest -- are you saying there was no arrest warrant in this case?

MR. PODLAS: The DNA Act says it can only be used to provide probable cause to get a warrant to get another DNA sample.

THE COURT: Does it say -- could you cite me to that?

MR. PODLAS: Yes, Judge, I can.

THE COURT: All right. Did you brief this for the Court by any chance, other than an omnibus motion, Counsel?

MR. PODLAS: I'm sorry?

THE COURT: Did you brief this issue for the Court other than to file an omnibus motion?

MR. PODLAS: No, I didn't.

THE COURT: Are you familiar with any recent cases in this court that have addressed any of these issues?

MR. PODLAS: I am not, Judge. And I don't think there are any, because, as I indicated, there is a major change in the legislature with respect, or in the legislation with respect to the DNA Collection Act effective January 1st, 2009. And I --

[11] THE COURT: So there may just be a need to postpone the hearing by virtue of the fact that in order for me to prepare myself to understand what the law is that I'm applying and hearing testimony, that I have the benefit of knowing that instead of just, you know, on the omnibus motion that was filed expecting me to be coherent in receiving your argument. So, let me go ahead and start with the statutory provisions, and then I'll hear from the State. And then we'll decide how to proceed.

But may I have the statutory provisions you are referring to?

MR. PODLAS: I'm referring to Public Safety Article 2-510, which is a part of the Collection Act which indicates a match obtained between an evidence sample and the data base entry may only be used as probable cause and is not admissible at trial unless confirmed by additional testing.

THE COURT: It doesn't say probable cause to get

another DNA warrant, it says probable cause.

MS. IRELAND: Right.

THE COURT: What authority do you have to say that it would be probable cause limited to obtaining another DNA warrant?

MR. PODLAS: Because I believe that it's [12]referred to...

THE COURT: Is probable cause defined?

MR. PODLAS: I'm taking a look right now, Judge.

THE COURT: Well, I'll tell you what we'll do. Public Safety Article 2-510, is there a paragraph that you're referring to, Counsel? I'm trying to catch up --

MR. PODLAS: 2-510 is basically a one-sentence provision. The relevant portions of the DNA Collection Act, Judge, I can give to you --

THE COURT: Yes, please do.

MR. PODLAS: -- they are in the definition section, which is 2-501.

THE COURT: Of the Public Safety Article?

MR. PODLAS: Correct.

THE COURT: Okay.

MR. PODLAS: The collection of DNA sample section, which is 2-504. And, of course, 2-510, which we discussed.

THE COURT: All right. Well, since I didn't have the benefit of knowing the nature of the challenge in advance of this moment, I haven't had a chance to look at those. So, if you will indulge me for a minute, I will.

[13] Let me see if, before I do that... are these the statutory provisions that were in effect when the arrest was made? The Defendant's arrest.

MR. PODLAS: Yes, they were in effect when he was arrested.

THE COURT: All right.

MR. PODLAS: They were in effect, effective January 1, '09. He was arrested in August of '09.

THE COURT: Okay. Now, the process of collection, are we operating under the process of collection as it was authorized at the time the collection was taken? Or do we follow the law as it was in effect at the time that there was a cold case? Do you understand, are you asking -- do you have the provisions of the law about the collection of the defendant's DNA that were in effect when his DNA was collected?

MR. PODLAS: The State alleges his DNA was collected in April of '09, and the provision I've just given Your Honor in effect in April of '09.

THE COURT: Okay, good. Then I think I have the applicable law at a very minimum. And I just wanted to make sure I did, because the allegations of the underlying crime were very old so I just wanted to make sure.

[14] Okay. So, does that, and you feel like that pretty well concisely states pretty much the foundation for your requesting this Court to suppress any evidence seized from the Defendant, including his DNA and any arrest and or charging document that may have been the result of that?

MR. PODLAS: Yes, Judge.

THE COURT: Okay.

MS. IRELAND: And I would represent that the State did not have the benefit of that relatively concise description of what the issues were, and I have been seeking them since prior to the last motions hearing which was January 22nd. And I would like, well, I will represent to the Court, the State is able to proceed on what it has been told were the issues, but I am not prepared to proceed on anything that would require testimony from the Maryland State Police Crime Lab or any individuals there.

THE COURT: Okay.

MS. IRELAND: So, if he's alleging, and I still don't understand in what way he is alleging that the collection --

THE COURT: He is saying he doesn't have to tell you that, that all you have to do is to prove that it's correct and allow him to challenge that [15]once you meet your burden.

MS. IRELAND: And I don't think that that's a correct statement.

THE COURT: Do we have any authority on where the burden lies with reference to the initial process in terms of its validity?

MS. IRELAND: No, I don't.

MR. PODLAS: Judge, with respect --

THE COURT: Do you?

MR. PODLAS: -- with respect to the first issue, all she has to do is read the Act. It tells her what's required.

THE COURT: Well, wait a minute, Counsel.

MR. PODLAS: And here we are, going to get delayed again.

THE COURT: Well, it doesn't sound to me, Counsel, as if -- I don't know, I was not the presiding judge at the last hearing, I have no idea what information was exchanged. What information was exchanged since the last hearing from your end of the equation to the State, since the last hearing?

MR. PODLAS: Initially it was —

THE COURT: Since the last hearing.

MR. PODLAS: Since the last hearing.

THE COURT: Has anything, have you given the [16]State anything further to identify the issues you have just announced to me, to her since the last hearing?

MR. PODLAS: What I have said to her is that I've maintained, I've told her previously that he doesn't believe his DNA was even taken, and that's a factual issue, and that, and that our position is that the DNA is illegal unless it was collected in accordance with all the provisions of the Act. And I put that in an e-mail to her.

THE COURT: Okay.

MS. IRELAND: February 9th.

THE COURT: So, let's do this. This is not exactly your typical legal argument. And I appreciate that, Counsel, but, you know, you're really putting out there this process and making sure your client's rights are protected. It's good work.

On the other hand, you can't expect Ms. Ireland, or for that matter, the State to have any comprehension of where you are going with just kind of a generalization.

What is it that the State is ready to proceed on today? Were there statements taken by the Defendant?

MS. IRELAND: No.

[17] MR. PODLAS: No.

THE COURT: Was there evidence other than DNA seized by the Defendant that would be used at trial?

MR. PODLAS: No.

MS. IRELAND: No.

THE COURT: Were there any other seizures and/or, let's see, identifications of the Defendant?

MR. PODLAS: No.

MS. IRELAND: No.

THE COURT: So the only evidence that we have before us is the DNA question?

MS. IRELAND: Yes.

MR. PODLAS: Yes.

THE COURT: Okay. So, what portion, if any, of that challenge are you able to make today?

MS. IRELAND: Your Honor, I can... on February 9th when I learned through an e-mail, actually I didn't

learn it February 9th, I learned that Mr. King was maintaining that he has never had his DNA collected to be put into the Maryland Data Base, I learned that this morning, however, on February 9th when Mr. Podlas sent me an e-mail indicating that he wanted, he still had motions issues, I did subpoena the actual individual who [18]collected the DNA. And she is here to testify to that effect.

THE COURT: All right.

MS. IRELAND: And I also have Detective Tucker to clarify when he received notification from the Maryland State Police Crime Lab that a hit had been established through that submitted DNA.

THE COURT: Okay.

MS. IRELAND: May I just lay out the chronology? Because I don't know if the Court prefers that this hearing be bifurcated or if the Court...

THE COURT: Well, here is the problem with bifurcation. I am in no way adverse to bifurcating the issues. In fact, sometimes it's what is required for one reason or another. The issue that I do have, however, is that if they are so integrated that the same judge would have to hear the hearing, in other words, it would be a continuation, then it would be a problem because I don't know that I would be available in a timely way to be able to resolve this issue for the benefit of Mr. King, who is, I take it from his shackles, is confined.

MS. IRELAND: For the record, may I set forth the chronology that brings the State to the [19]point where we could address part of the issues presented today and not another part?

THE COURT: Yes, okay.

MS. IRELAND: Your Honor, on January 22nd this matter was set for motions. And as is my practice I had a conversation with Mr. Podlas to try to have him identify his issues. I can't represent to the Court any specific date prior to January 22nd that I talked to him, I didn't make any notations, though we did have conversation because he had indicated that, what he told me was the officer had no right to take his DNA, that's my issue.

So, Barry Tucker, Detective Barry Tucker took the DNA, but that was pursuant to a court order. In other words, this man was arrested based on probable cause from the cold case hit, an application was obtained, and he was arrested.

THE COURT: Can you give me those dates? Since you're doing a chronology.

MS. IRELAND: Well, I might need Detective Tucker up here to help with the precise dates.

MR. PODLAS: That wasn't the issue at the January 22nd motion --

THE COURT: Well, wait a minute, because I can't go back and forth. I gave you, really, I [20]believe, Mr.

Podlas, a full opportunity to explain for my benefit what we were doing. Let's understand... because this is going to help me, and if it's a proffer that you are willing to accept, you may be forgiven from requiring certain additional proof so....

MS. IRELAND: The notification to Detective Tucker was on August the 4th of 2009.

Officer Tucker, can you indicate when you obtained the application for the arrest of the Defendant?

(Pause.)

MS. IRELAND: Can I go ahead?

THE COURT: Sure.

MS. IRELAND: In other words, when I was told that that was the issue, I knew that the DNA had been, the second sample had been collected. I had asked for it. I had to file a motion to compel. The motion to compel was granted. The Circuit Court judge ordered that DNA be collected. And that was done.

And Mr. Podlas telling me that the officer had no right to take his DNA, I looked deeper, obviously, the Court had the authority to order that, so I looked, and believed that the issue was not a [21]very compelling issue since it was pursuant to a court order, but then I believe that perhaps his issue, as he has now identified, I surmised that perhaps he was saying that we, the State should not, did not have probable cause

to arrest based on that sample, but rather had probable cause to get a search warrant for a second sample, should have gotten a second sample in order to make an arrest, so I was prepared to litigate that.

However, on the motions date of January 22nd, Mr. Podlas indicated to me, and then I got that on the record, that he had issues as to whether the DNA was collected pursuant to the timing of the statute, et cetera. And I was not prepared to address any of that having no factual information pertaining to the collection of the DNA that caused it to be put into the DNA data base. And I requested a continuance so that I could clarify when that was collected and if it was pursuant to a qualifying crime under the statute that's been referred to.

Mr. Podlas pointed out to me after court that he believed that the State had made a fatal error in collecting the buccal swab that went into the DNA data base because Mr. King was only charged and not convicted and the effective date of the [22]statute was January '09. At the time it looked like, and Mr. King had two prior arrests, either of which might have been the basis for the input of the DNA. One was in '08. One was in '09.

So, the State set about to gather that information from the State Police Lab. I had to file discovery to obtain that. And so on January 28th I sent Mr. Podlas the documents showing the collection date of April 10th and, in fact, that it was for a qualifying offense of first degree assault. It was --

THE COURT: Wait a minute, I can't write that. Okay.

MS. IRELAND: I'm sorry.

THE COURT: January 28th, 2010, you sent Mr. Podlas documents showing that the collection was for...

MS. IRELAND: A qualifying offense under the statute, that qualifying offense being first degree assault.

THE COURT: When was the collection taken?

MS. IRELAND: And the collection occurred on April 10th of 2009. Being four months after the effective date. The change in the law, as I am sure the Court is familiar, is prior to January of '09 a [23]person had to be convicted before the upload into the DNA data base. January 1, 2009, certain qualifying offenses merely upon arrest permit the collection and the input into the Maryland DNA Data Base.

By this letter I also indicated, this letter of January 28th, does that obviate the need for the February 12th motion? On January 29th, since that was what he had identified as his issue to me outside of court, on January 29th, Mr. Podlas e-mailed me and said I'll let you, basically, send me the documents, I need to see it and I'll let you know Monday, which if there are 31 days in January, then that would have been February 1. And I didn't hear from him. This motion being upon us on February 9th, I sent him another e-mail asking if he still had any issues for motions. And he

responded, yes, was the DNA taken or taken properly? And that's where --

MR. PODLAS: My exact words in the e-mail was, my response was, first Mr. King has told me there was no DNA taken from him in April of '09, in addition, if there was DNA taken, my position has been from the beginning that such taking was illegal unless it met all the requirements of the DNA Collection Act.

That is verbatim of how I responded.

[24] MS. IRELAND: That is a verbatim of his e-mail, but that's the first time he identified the issue that -- and I still don't know if he has issues post the collection.

THE COURT: Is chain of custody basically, I mean, I'm hearing that it could be chain of custody --

MS. IRELAND: It seems a trial issue to me.

THE COURT: Well --

MR. PODLAS: Judge, the seminal issue here is the DNA that went into CODIS. Because if that's no good, nothing else is. Because it's all the fruit of that. Okay? So I --

THE COURT: No good in my mind would mean it was not the Defendant's.

MR. PODLAS: No good in my mind is, either it was not the Defendant's, or it was not collected in

accordance with the law.

THE COURT: Okay. All right. So, what I think is that I'm going to have to look at the provisions of that statutory section to understand what you say when you mean in accordance with the law. Okay?

So, it's quarter of twelve. We're going to come back. The witnesses who are here are able to [25]give their testimony. Mr. Tucker is local. The other witness is from?

MS. IRELAND: The Detention Center.

THE COURT: Okay. So it's not a hardship. You may retain them if you wish, so that they can give whatever testimony that they have today. However, that would hamstring you both into being required to continue any hearing with me as your presiding judge. And since I don't know about my availability or yours between now and, the Hicks date is April 13th, 2010, you may wish to reserve the right to have one judge hear all of it at one time.

MR. PODLAS: If it's going to be bifurcated, Judge, obviously that's, I think, critical.

THE COURT: Well, it's not going to be bifurcated if we're going to reserve everything until all the issues are clear.

MS. IRELAND: And if he maintains he doesn't have to do that, I think, you know, as an officer of the Court, and in the interest of fairness, if he has an issue

that something was done incorrectly, then that should be identified so the State can, not so the State can clean anything up, but so the State can procure the appropriate witnesses. And I indicated that —

[26] THE COURT: That's fine. So here's what we can do. Over the recess you can provide me the exchanges that have occurred, a copy of everything that you have sent Ms. Ireland.

Ms. Ireland, you can provide me with a copy of everything that Mr. --

MS. IRELAND: I have that.

THE COURT: -- Podlas has sent to you.

And then when we come back, I will be able to ferret out what it seems is, whether there has been a fair identification of what the State would be required to produce in response to the challenge, okay?

None of that was provided to the Court I can assure you, so I won't have the first clue, other than what you're arguing to me today.

We are going to take an hour recess. We will come back at, I have a 12:00 meeting with the Standing Examiners, as I told you earlier on the record, and I expect that to take me until 1:00. So there's no point in having you here before 1:00. We will start at 1:00, maybe a few minutes thereafter, okay?

MS. IRELAND: Does the Court want those e-mail

exchanges now?

[27] THE COURT: Oh, to the extent that you have them, but you may want to make sure that you and Mr. Podlas see what you each are presenting to the Court.

MR. PODLAS: Yeah, I'm not sure I have them, I'll check over the --

THE COURT: So, the witnesses, unless you are excused by the State's Attorney, you are required to return at 1:00. And we'll let you know as soon as you can be excused. I'm not trying to unnecessarily detain you, if we can spare you the need to come back we will, but that's not clear to me at this point.

DETECTIVE TUCKER: Do you think we'll be done by 2:30? I have a doctor's appointment that I must attend.

THE COURT: Yes, well, we'll see.

(Recess in proceedings.)

THE COURT: Counsel, sorry for the delay.

As you know, I had a meeting, and when I returned I spent what time I could trying to discern whether we could begin the hearing today or not with the information that I have before me.

Where is Mr. King?

DEPUTY SHERIFF: Right here.

THE COURT: So we are going to return to [28]K09-0807.

MS. IRELAND: Your Honor, Mr. King is entering the courtroom.

I have a print-out of the e-mails that I could retrieve, and I believe they are the same as the Court has received from Mr. Podlas, but in case I overlooked something, may I provide you with these?

THE COURT: Sure.

Would you mark that as State's 1 for purposes of the motions only? And these, I believe, were the contents of Mr. Podlas's communiqués, which will be Defense's 1 for purposes of motions only.

(E-mails, were marked as State's Exhibit No. 1, into evidence.)

(E-mails, were marked as Defendant's Exhibit No. 1, into evidence.)

THE COURT: Now, the original request of the Court was whether or not we could proceed today, the State was requesting a continuance or at least a possibility of bifurcating the hearing. So, I heard from counsel regarding what the defense's position was. And not having had advance notice of the nature of the challenge, the Court is trying to educate itself in the absence of having received any understanding of what

I should be prepared to hear [29]today.

So, I now have had an opportunity to look at the Public Safety Article.

Mr. King, if you would like to be seated, you may.

Counsel, feel free to be seated.

And have had the benefit of an Attorney General's opinion, which was a nice discussion by Robert L. Dean, Deputy State's Attorney for Prince George's County, I'm sorry, this is an article -- no, it was, I'm sorry, it was published in '89, opinions of the Attorney General, 189, captioned "arrest, DNA data base match may be used to establish probable cause for an arrest." "Opining that in our view the legislature did not intend to bar the use of a data base match as part of the probable cause to support an arrest warrant."

So I recommend that to you.

MS. IRELAND: We have that, Your Honor. I had provided that to Mr. Podlas prior to today's date.

THE COURT: Okay.

MR. PODLAS: I have it, Judge. I've read it and, you know...

THE COURT: Did you provide it to the Court?

[30] MR. PODLAS: I'm sorry?

THE COURT: Did you provide to it the Court?

MR. PODLAS: She provided it to me.

MS. IRELAND: No. In advance of this motion I did.

THE COURT: Well, good, so you all had the law that I didn't have, and that's the law that I was able to find over the luncheon recess since it wasn't given to me in advance.

Now, the only other case about DNA that I could think of that might have some bearing on the dispute between the parties is State of Maryland versus Charles Raines the Court of Appeals of Maryland, Number 129, September Term 2003, although it is not necessarily on point.

I believe I detect a dispute between the State and defense about what the burden of production is in this case. And neither counsel have offered any case law on, if the State is relying on a Public Safety Article data match as justification for an arrest warrant, whether they would be required to produce all of the conformity set forth in the Public Safety Article as to the eligibility for a DNA sample based upon a convicted or unconvicted inmate's offenses, and further comply with as I understand [31]Mr. Podlas's very general challenge to...

MR. PODLAS: Judge, if I could just --

THE COURT: No, Counsel, you know, I think you

better just let me finish my train of thought. Then I'll be happy to hear from you at length.

2-504 regarding the collection of DNA samples, specifically the place of collection, authorized collectors, second DNA sample, meaning that, for example, the State would then have the obligation to, without further notice, provide testimony that the DNA sample was collected by an individual who was appointed by the director, trained in collection procedures that the crime laboratory uses, and so forth. And that, furthermore, that the individual from whom the DNA was collected is convicted of a felony, as a first degree assault is, assuming that was the State's case, and so forth.

And presumably by nature of the challenge also bring in the live witnesses to testify that the Defendant was the person from whom the DNA was taken. That's my understanding of Mr. Podlas's position. Is that a fair assessment?

MR. PODLAS: Yes, Judge, and just so I make sure that I'm clear with respect to authority for the burden, it is clear by case law that the taking of [32]DNA is a search. That's established law. The question that arose in the Raines case is whether it was a reasonable or unreasonable search. But the starting point with a search is always that a search without a warrant is unreasonable; therefore, that's why I said that the burden of proof belongs to the prosecution to show that either it was a reasonable search or they had a warrant, and we know they didn't have a warrant, they have to show it was a reasonable search by

showing compliance with the Act.

THE COURT: But, really, it's removing it one step further, so she had a warrant, the warrant for the buccal swab that would be introduced at trial was signed by a judge, it was that buccal swab that was tested, that is now the buccal swab and the DNA that would be testimony at trial. Prior to the time that the Defendant was given that buccal swab, he was arrested based upon the match. The match was based upon a DNA sample that was taken as a result of, allegedly of the fact that he was a convicted felon and --

MR. PODLAS: He wasn't convicted, Judge, he was arrested.

THE COURT: -- arrested felon pursuant to 2-502, 3, etc. And that was the probable cause which [33]I've referred to here in this Article and that you all obviously knew in advance of today, so what you're asking the Court to do is have an entire hearing on the probable cause for the issuance of the arrest warrant, and requiring the State to bear the burden of establishing the probable cause that was the foundation of the arrest warrant from the get-go.

And I am not sure that that is the burden on the State. The State had an arrest warrant. The arrest warrant was issued by a neutral magistrate. The neutral magistrate had before it the information, I'm assuming, that there had been a DNA match through this process contained in 2-501. So, the arrest was based on a warrant. It was not a warrantless arrest.

MR. PODLAS: Well, but the arrest is almost irrelevant, Judge, because what, the DNA --

THE COURT: But didn't you just tell me earlier that it was an unlawful arrest?

MR. PODLAS: That's part of our position, but alternatively, Judge, our position is that the DNA sample that was used to generate the report that I just got last week, which they intend to rely on at trial, that DNA sample came as a result of the probable cause by this CODIS match. And that's what's being challenged, because they wouldn't have [34]gotten the second one if there hadn't been one from that CODIS match, that is a --

THE COURT: But, in essence, what you're saying is that the probable cause relied upon for the issuance of the warrant was unreliable, untruthful, was somehow tainted; isn't that right?

MR. PODLAS: Correct.

THE COURT: Then the State has a warrantless, or an arrest based upon a valid warrant, you are challenging the foundation for the arrest based on the valid warrant, are you not?

MR. PODLAS: Yes, and I am also challenging the --

THE COURT: Okay, so --

MR. PODLAS: -- the DNA.

THE COURT: -- but then, if you are challenging the State's foundation for the issuance of the arrest warrant, is not the burden on the Defendant?

MR. PODLAS: To challenge...

THE COURT: So I will give you all seven days to give me a memorandum of law on that. There you go. Because we're going to have this issue come up again and again. It may very well be that that foundational challenge, Counsel, that I'm incorrect [35]on that, but the way I see it, is that you want to go behind the issuance of the arrest warrant and you want to challenge the foundation upon which the arrest warrant was issued. And the way that you want to challenge that was to say it was unlawful to take this gentlemen's DNA, or that it wasn't his DNA that was taken, or that it wasn't taken in conformity with the protocols set forth. But it would be a little bit like, if the Court issued a search and seizure warrant based upon an affidavit, and at a motions hearing you wanted to challenge the probable cause for the issuance of the warrant and you wanted the Court to go outside the four corners of the
affidavit. Right?

MR. PODLAS: No.

THE COURT: Okay. Then you better tell me why not.

MR. PODLAS: Because the issuance of the warrant
--

THE COURT: Not right now. I think what you need to do is, I'm not, myself, I'm not necessarily going to be the presiding judge, but for any court and for our benefit for a context into which to place the testimony, I would like some authority upon which both the State and the defense rely for their [36]respective positions.

MS. IRELAND: May I point out to the Court? That some of, while not dispositive, it's certainly persuasive, in the opinion of the Attorney General that you referenced, the opinion they stated there said, or in the body of it, a DNA data base match is analogous to hearsay or other types of evidence that the legislature or courts have determined to be inadmissible at trial for a variety of reasons, a data base match is not illegally obtained evidence that is subject to an exclusionary rule like the fruits of an unconstitutional search.

So, at this juncture that would be the authority that I would offer you.

MR. PODLAS: And again, Judge, I am viewing it from a different perspective. We talked about going out of the four corners of the affidavit, the affidavit that got the State a second sample is the CODIS match.

THE COURT: Okay.

MR. PODLAS: So that is within —

THE COURT: Counsel, I don't have any evidence before me, at all, because we haven't started the

hearing. We haven't been able to get that far because the first question that arose was [37]who has the burden of production in a challenge to the use of the CODIS match as a foundation for the issuance of an arrest warrant, where in this case an arrest warrant was issued, and a subsequent search warrant for a DNA sample was issued, the arrest warrant was based on the CODIS match.

MR. PODLAS: As was the subsequent warrant.

THE COURT: Okay. The warrant served as the foundation to arrest this gentleman, correct?

MR. PODLAS: The arrest warrant.

THE COURT: The warrant was the basis, so the question was, was the warrant properly issued? And my understanding, and I could be wrong so I'm giving you the benefit of any question, is that when one challenges the issuance of a warrant, the burden shifts away from the State, if it was a warrantless arrest or a warrantless act, the State would have the initial burden, but not where it was an act that was based upon a warrant issued by a neutral magistrate.

MR. PODLAS: But here is where the problem is, Judge. Your Honor is focusing on the arrest warrant, but that arrest warrant, I think everyone can agree, that that arrest warrant would not have been issued but for the CODIS match. The CODIS match comes from the taking, the collecting of his DNA, and [38]that is a warrantless search.

THE COURT: Okay. And you're going to be welcome to correct me, or another judge, because I do not know that I will be the person, but my understanding is that, Mr. Podlas, you are telling the Court, I don't have to do anything, the State has to produce every single person to demonstrate the Defendant was then confined, it was the Defendant personally who was confined, it was the Defendant who gave the sample, the sample was taken in conformity with the rules and regulations pursuant to the law on taking samples of DNA by a person who had the necessary training, skill and judgment, and so forth, and that she has to produce all those witnesses and produce all of that evidence live for your benefit, just because you said that I want to challenge the underlying basis for the issuance of an arrest warrant. Is that right?

MR. PODLAS: Yes.

THE COURT: Okay.

MR. PODLAS: I don't have the ability to access that information. Only the State does.

THE COURT: All right. Well, you have the ability to issue a subpoena duces tecum, and you have the same ability that you would in any kind of a [39]challenge to the DNA evidence that's subsequently going to be presented to a jury, correct?

But, see, you don't get that, you don't get those rights because that's not what the State is going to rely upon as a part of the prosecution. They are not going

to rely upon the CODIS match. The CODIS match won't be admissible in the prosecution, at all, correct?

MR. PODLAS: Correct, but they wouldn't have had the warrant but for the CODIS match.

THE COURT: Okay. Arrest, DNA data base match may be used to establish probable cause for arrest, is the starting point. And I don't see a single authority that you're giving me, not one, that says anything to the contrary.

MR. PODLAS: Well, Judge, that's a law enforcement opinion, there is no case law on it. It's an Attorney General opinion.

THE COURT: It's the only one I have. I didn't say it was that authority that I had to follow, but if it's the only authority that I've got, then right now you're so advised. Okay?

So, I'm going to grant your request for a continuance. I'm not going to begin taking testimony. I'm not going to entertain a motion to [40]bifurcate. Because I believe that, first of all, I believe that there is a genuine dispute between the State and the defense, and because the Court is not able to make a ruling on the information that it has before it, and wishing to protect the Defendant, if, in fact, he has the rights that you assert on his behalf, he should not be prejudiced by the fact that I am unable to reach that conclusion today in the time that I had available to me, first.

Secondly, I can't see any prejudice because it sounds to me, from what the State represented, unless you are going to correct me, that there will be a request to continue the trial date in any event. Correct?

MS. IRELAND: It's correct, and may I also indicate I believe he's serving a sentence in another case.

THE DEFENDANT: No.

MS. IRELAND: Or awaiting trial in another case as well in Worcester County.

MR. PODLAS: He's not, Judge, that sentence is finished. He is being held on this.

THE COURT: Okay. Well, but my understanding is that the DNA evidence that was based upon the warrant for the buccal swab after his arrest [41]has been tested, the results have been made available to the defense. Is that correct?

MR. PODLAS: Last week.

MS. IRELAND: Right now these results are being given to him. This is dated January 28th. I received it, it was received in my office on February 9th. This is the analysis of the DNA that was subject, or taken subject to the Court's order following the State's motion to compel.

THE COURT: But, of course, there is no requirement that, I mean, there is no necessity that

that would generate a need for a continuance. It's being provided. My understanding was that Ms. Ireland was representing that she thought the defense would be asking to have additional time to have an expert review that report.

MR. PODLAS: Exactly, Judge. And we're entitled under the statute to 30 days. We didn't get 30 days, obviously. Is that something we can deal with here?

THE COURT: No. But in making a finding about whether any delay in hearing this motion would have some adverse effect, I'm considering that, not by way of granting it but by reflecting that it appears to me that a written motion to continue will [42]be imminent, and that the State would be concurring by virtue of the statutory scheme of the need therefor.

MR. PODLAS: That's my understanding.

MS. IRELAND: That's correct.

THE COURT: So we will go ahead and reschedule this on the next motions date, and that being, I think I already... that would be the, I'm sorry, the trial date, since you are both scheduled to be here and the Defendant, I believe, is probably already under subpoena, or whatever one is when one is not at liberty, was scheduled for what date?

MS. IRELAND: March 2nd.

MR. PODLAS: March 2nd.

THE COURT: Today is the 12th, so if I gave you each two weeks that would be the 26th. That would give you enough time to provide the Court with a memo on the burden of production and the burden of persuasion.

MS. IRELAND: Yes, Your Honor.

THE COURT: And the burden of proof. So the question is, when you have a motion of this nature, who's going to begin the hearing, is it going to be the defense's requirement to make a showing before the State has to respond, or vice versa?

[43] All right.

MR. PODLAS: So the memo is due from the defense --

THE COURT: 14 days from today.

MR. PODLAS: Or from both of us?

THE COURT: From both of you simultaneously. You will have an opportunity between then and the hearing date to respond, if you feel it necessary to do so, to the other party's motion. But any and all authority that you have for your position, any position that you're going to take before the Court on this unique area of the law, not unique, but certainly novel, for me anyway, and if Counsel, in the interim the Court is able to discern of its own authority anything that it believes that you should be made aware of, I will give you that courtesy as well.

MS. IRELAND: Thank you.

MR. PODLAS: Should the memos be directed to Your Honor?

THE COURT: They should be directed to the Court file just as if it was a motion for continuance or anything else, you don't know who's going to get it. I don't know that I would be available to rule on these motions, but it will be set in due course [44]for the date that's originally scheduled for the trial date.

MS. IRELAND: Thank you, Your Honor.

(End of proceedings.)

STATE OF MARYLAND * NO. K-09-0807 CRIMINAL
* CASE IN THE CIRCUIT
vs. * COURT FOR WICOMICO
* COUNTY, MARYLAND
ALONZO KING, JR. *
* * * * * * * *

MEMORANDUM OF LAW

The Court has requested the Defense and the State to provide a memorandum of law as to the issue of the DNA taking as it relates the suppression motions yet to be determined by the Court. The Defense contends that all DNA evidence in this case (related to the Defendant) should be suppressed because it is the fruit of a DNA database entry (into CODIS System) of DNA taken from the Defendant in April of 2009 after an arrest for an alleged "crime of violence", which did not result in a conviction (but rather was later nolle prossed). The State contends that this initial DNA taken was in accordance with P.S. § 2-501 et. seq. (as amended effective 1/1/09) otherwise known as the "DNA Collection Act". The Defense also contends that this law, as recently amended, as applied to the case herein, is unconstitutional as violation of the 4th amendment.

The Court has asked for this memorandum specifically as to the issue of the burden of proof (and production) on the motion proceedings. The Defense begins by pointing out that it is settled law that the taking of a person's DNA is a search, *State v. Raines*, 383 Md 1 (2004), *United States v. Stegman*, 295 F Supp. 2d 542 (U. S. District Court, D Maryland 2003). Additionally there is no dispute that the search was

without warrant, rather, the State contends that a warrant was not necessary because the DNA allegedly taken in April of 2009 was taken pursuant to the recently amended DNA Collection Act.

It is also well settled law that a search without a warrant is per se unreasonable, subject to only a few exceptions, *Bailey v. State*, 2010 W L 114498 (Court of Appeals of Maryland, Jan. 10, 2010 at pg 17). In all such cases the State has the Burden of proving the reasonableness, and thus the legality of a warrantless search, *McDowell v. State*, 407 Md 327 (2009) at page 341, see also *Paulino v. State*, 399 md 341 (2007) at pg 348.

Accordingly, if it is the State's position that the initial taking of the Defendants DNA in April of 2009 was a justified search without a warrant then it is their burden to show that the DNA was taken in strict accordance with all requirements of the DNA Collection Act.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of February, 2010, a copy of the foregoing was hand delivered to the Office of the State's Attorney, Courts Building, Salisbury, Maryland.

_____

James J. Podlas

STATE OF MARYLAND,	* IN THE CIRCUIT
Plaintiff,	* COURT FOR
	* WICOMICO
v.	* COUNTY
	* STATE OF MARYLAND
ALONZO JAY KING, JR.,	*
Defendant.	* CRIMINAL CASE NO.
	* K09-0807

* * * * * * * * * * * * * * * * * *

MEMORANDUM OPINION

The parties came before the Court for a hearing on February 12, 2010 to present arguments regarding the constitutionality of the DNA Collection Act as set forth in the Maryland Annotated Code, Public Safety Article, Sections 2-501 et.seq. and the sampling of Defendant's DNA in conformity therewith. This Court postponed the hearing to March 2, 2010 in order to permit the filing of pre-hearing legal memoranda. However, in order to facilitate the order of proceedings on March 2, 2010, this preliminary ruling is entered.

PROCEDURAL AND FACTUAL HISTORY

This matter was set for a hearing on the Defendant's Motion Pursuant to Maryland Rule 2-252 on February 12, 2010. The Defendant appeared with counsel James Podlas, Esquire and the State of Maryland was represented by Assistant State's Attorney Elizabeth Ireland. At the outset of the hearing a dispute arose between the State and Defense regarding which party had the initial burden of going forward on the Defendant's Motion. Argument were

heard. State's Exhibit #1 and Defendant's Exhibit #1 were received into evidence and consist of the communications between the State and Defense regarding discovery. The State was willing and able to produce witness testimony and evidence on February 12, 2010, based upon its understanding of the issues. However, the Defendant contended that the State was required to establish that any seizure of the Defendant's DNA was taken in strict conformity with all requirements of the DNA Collection Act as set forth in the Maryland Annotated Code, Public Safety Article, Sections 2-501 et.seq. The State disagreed.

The court postponed the hearing and instructed counsel to file memoranda to identify more precisely for the court the search and seizure issues to be litigated and any legal basis for their respective positions, particularly as to the respective burdens of proof and production. Memoranda were to be filed on or before February 26, 2010. The Defendant filed a Memorandum of Law on February 23, 2010. The Court extended the deadline for the State until February 29, 2010.

It is the court's understanding after hearing arguments and reviewing the defense's memoranda that the defense challenges:

> The constitutionality of Public Safety Article Sections 2-501 et seq, in particular the seizure of the Defendant's DNA pursuant thereto, as an unlawful violation of the Defendant's Fourth Amendment rights.
>
> That the Defendant's DNA was, in fact, seized in April of 2009 (the Defendant denied this through counsel);
>
> That the warrantless seizure of the Defendant's

DNA in April of 2009 was based upon probable cause;

The lawfulness of the Defendant's arrest based upon a DNA "hit";

The Order issued by this court on November 18, 2009 for the Defendant to submit to a buccal swab for his DNA and evidence of the resulting "match" of the second DNA with the assailant's DNA asserting that it is "fruit of the poisonous tree";

The Defendant stands charged before this court with First Degree Burglary, First Degree Rape and related offenses which are alleged to have occurred on September 21, 2003. The Defendant's DNA was taken in April 10, 2009, along with his fingerprints and other identifying information. *See*, MSP Forensic Sciences Division DNA Database Information Card, Defendant's Exhibit #1. Neither State's Exhibit #1 nor Defendant's #1 indicate the case number or offense date for the offense which generated the collection of the Defendant's DNA. According to Defendant's Exhibit #1, the charge was represented by the State to be First Degree Assault. However, the Court can take judicial notice of the fact that the Defendant was charged in Wicomico County Circuit Court in case number 22-K-09-000428 with four counts of First Degree Assault and one count of second degree assault. The case originated in the District Court. The offense date was April 10, 2009, and the Defendant was arrested the same day as the DNA sample was taken above. His first appearance in the District Court was on April 13, 2009. On September 16, 2009, he was convicted of Count Five, Second Degree Assault, and sentenced to four years, with all but twelve months suspended. He

was represented by Jim Podlas. The Honorable Donald C. Davis presided.

There was a data base "hit" on August 4, 2009 connecting the Defendant to the instant offenses. The Grand Jury returned an Indictment in this matter on October 13, 2009. The only basis for the probable cause to identify the Defendant as the perpetrator was the data base hit. This Court issued an arrest warrant dated October 13, 2009 and ordered that the Defendant be held without bond and brought before the court. Subsequently, the Defendant waived his right to a bond review and has been held without bond to date. On November 18, 2009 this Court entered and Order compelling the Defendant to submit to a buccal swabbing for comparative DNA testing. Thereafter, the Defendant's known standard from the buccal swab Ordered on November 18, 2009 was submitted for analysis. It is from the seizure of the Defendant's DNA on November 18, 2009 that the comparison was made, not the Defendants April of 2009 sample.

DISCUSSION

The statutory scheme adopted by the Legislature in Public Safety Article § 2-501 of the Maryland Annotated Code does not require a warrant to be issued for the collection of a DNA sample from an individual charged with a felony or a violation of §§ 6-205 or 6-206 of the Criminal Law Article. The collection procedure is made, legislatively, an exception to the warrant requirement by virtue of an individual having been arrested, and thus having been determined by at least probable cause to have committed a qualifying crime, the collection is thus

neither an unreasonable search nor an unreasonable seizure.[1] The Defendant's protection in this legislative scheme is that the match, if any, is not admissible as evidence at trial unless confirmed by additional testing.[2]

It is well settled that prisoners do not enjoy the same Fourth Amendment protections against unconstitutional searches and seizures as the general population. *Hudson v. Palmer*, 468 U.S. 517 (1984). In *State v. Raines*, 383 Md. 1 (2004), the Maryland Court of Appeals found the taking of an inmate's DNA to be a constitutional search, and thus the procedure does not violate the safeguards of the Fourth Amendment. The Maryland DNA collection scheme allows for DNA testing of all persons arrested for crimes of violence or for burglary. The taking of the sample cannot occur until the person is actually charged, and the sample may not be tested or placed in the statewide DNA database prior to the first scheduled arraignment date unless requested or

---

[1] Public Safety Article § 2-504(3)(i) provides: "In accordance with regulations adopted under this subtitle, a DNA sample shall be collected from an individual who is charged with:
1. a crime of violence or an attempt to commit a crime of violence; or
2. burglary or an attempt to commit burglary."

[2] Public Safety Article § 2-510 states: "A match obtained between an evidence sample and a data base entry may only be used as probable cause and is not admissible at trial unless confirmed by additional testing."

consented to by the individual.[3]

The Court finds the legislative scheme to be constitutional. In this case, the State obtained a warrant for the Defendant's arrest and obtained an order for a DNA sample of the Defendant after his arrest for confirmatory testing and use of such results as evidence at trial. Both the arrest of this Defendant and the seizure of his DNA were presumed to be lawful, and the burden is upon the Defense to prove otherwise. The Court finds that the State is therefore not required to establish that the manner of collecting, storing, and testing of the Defendant's DNA was in full adherence with all provisions of Public Safety Article § 2-504 et. seq. as well as the protocols adopted by the Director and Secretary of the Crime Laboratory.

An analysis of *Fitzgerald v. State*, 153 Md. App. 601 (2003) is instructive. In *Fitzgerald*, the Defendant challenged the reasonableness of using a drug-sniffing canine to gather probable cause for a search warrant. Specifically, Defendant challenged the reliability of the canine. The Court found that once the "canine has been certified in contraband detection, it is not within the magistrate's responsibility or training to re-analyze the statistical record for each canine whose sniff is presented as support for the issuance of a search and seizure warrant, how the canine signals to its handler or how long is appropriate for a response to be made." *Id.*, at 638. Instead, this was an attempt by

---

[3] *See* Letter of Attorney General dated May 5, 2008 re: Constitutionality and Legal Sufficiency.

Defendant to get outside the "four corners" doctrine.[4] If the Defendant seeks to scrutinize a warrant and its application beyond the four corners doctrine, it is his burden to demonstrate by a preponderance of the evidence that the supporting warrant affidavit is tainted by allegations of deliberate falsehood or with reckless disregard for the truth. *Id.*, at 643.

> *Franks v. Delaware* [438 U.S. 154 (1978)] set out a procedure, requiring a detailed proffer from the defense before the defendant is entitled to a hearing to go behind the four corners of the warrant. Under *Franks*, when a defendant makes a substantial preliminary showing that the affiant intentionally or recklessly included false statements in the supporting affidavit for a search warrant, and that the affidavit without the false statement is insufficient to support a finding of probable cause, the defendant is then entitled to a hearing on the matter. The burden is on the defendant to establish knowing or reckless falsity by a preponderance of the evidence before the evidence will be suppressed. Negligence or innocent mistake resulting in false statements in the affidavit is not sufficient to establish the defendant's burden.

Id. at 644.

The Court is persuaded that a challenge to the

---

[4] "At a suppression hearing challenging the issuance of a search warrant, the only evidence that should be considered by the court is that which is confined within the "four corners" of the warrant and its application." *Id* at 638-639.

warrant or court order that authorizes the taking of DNA should be similarly analyzed. Here, Defendant has raised no specific allegations of falsehood or reckless disregard for the truth. Rather, he proffers that he never gave a DNA sample in April of 2009, and therefore, any match in the database should not implicate him.[5] Because this argument seeks to go beyond the "four corners" of the warrant or order of court it must follow the *Franks* analysis, which as stated above places the burden on the defendant to show knowing or reckless falsity by a preponderance of the evidence. Defendant should be prepared to carry this burden at the evidentiary hearing on March 2, 2010, or show why that standard does not apply.

If the Court were to agree with Defendant's argument, the consequences for the State would be drastic. Any defendant could claim that he never gave a DNA sample, and then the burden would be on the State to prove not only that a valid warrant or court order was issued, but also prove at an evidentiary hearing each underlying fact supporting probable cause for such a warrant or court order. Instead, the warrant or court order *is presumed* to be valid on its face, and it is up to the Defendant to attack any supporting affidavit with specificity.

---

[5] Should he chose to offer evidence or testimony on this point, the State presumably could rebut this evidence by establishing that a "match" was confirmed through analysis using the second, Court ordered DNA sample

CONCLUSION

After reviewing all of the evidence and considering all arguments, the Court finds the legislative scheme for DNA collection constitutional, and that the Defendant's DNA samples are presumed to be taken in conformity therewith. The Order of Court compelling the Defendant to submit to DNA testing is also cloaked in a presumption of validity, having been issued after a Grand Jury found probable cause to believe that a crime was committed and that the Defendant was the person who committed it. Therefore, at the March 2, 2010 hearing it is the Defendant's initial burden to present facts entitling it to suppression of the State's DNA evidence.

_____

Judge

IN THE CIRCUIT COURT FOR
WICOMICO COUNTY, MARYLAND

STATE OF MARYLAND,	*	Criminal Docket
vs.	*	No. K09-0807
ALONZO JAY KING, JR.,	*	
Defendant		

_____/

REPORTER'S OFFICIAL TRANSCRIPT
OF PROCEEDINGS

Salisbury, Maryland
March 26, 2010

BEFORE:
The Honorable Kathleen L. Beckstead, Judge

APPEARANCES:

On behalf of the State of Maryland:
Elizabeth Ireland, Esquire

On behalf of the Defendant:
James J. Podlas, Esquire

REPORTED STENOGRAPHICALLY BY:
Valerie M. Dawson, RMR
Official Court Reporter
410-548-4938

[3] PROCEEDINGS
(March 26, 2010)

MS. IRELAND: The State calls the case of Alonzo King. This is case number K09-0807.

THE COURT: You know, we have been going without a break since -- I'm going to take a recess, and then we will start the case.

MS. IRELAND: Thank you.

THE COURT: We'll take a brief recess. (Recess in proceedings.)

THE COURT: Be seated, everyone.

So I have Mr. King's case. How long do you expect that to take?

MS. IRELAND: Respectfully, Your Honor, it's Mr. Podlas's motion.

THE COURT: How long do you expect that to take? I'm just asking because I have a 30-day VOP with Larry Lovett, so...

MR. PODLAS: I think that's Ms. Shannon's case.

THE COURT: Okay. And she's not here, she must be in another courtroom.

MR. PODLAS: No, she's right here.

THE COURT: Which is relatively brief.

Mr. Struve, I have to try to fix, and then Mr. Pitts [4]we'll definitely do after lunch.

MS. IRELAND: I was just...

THE COURT: Go ahead.

MS. IRELAND: I was just anxious to make sure that the witnesses that Mr. Podlas required, or the witness that he required to be here, who is from Baltimore, would be able to return before lunch.

THE COURT: Let's do that then. Very good.

So, we are here, and for the record, Counsel, did you each receive the Court's preliminary memoranda in this case?

MS. IRELAND: The State received it.

MR. PODLAS: Yes, Judge.

THE COURT: Did you understand it?

MR. PODLAS: Yes, Judge. I was going to give you a little bit of an opening statement here so we could try to narrow the issues.

THE COURT: Well, I tried to narrow the issues on the record repeatedly, and the narrowest I could get was to, of my own accord, listen to the transcript and try to address every issue that I could identify that you

had raised. So, that's fine. I'd be happy to narrow them, but if they're different than what's in here, then you're going to have a problem.

[5] MR. PODLAS: I don't think they are.

THE COURT: Okay. So why don't I start with, did you receive the memoranda and did you understand it?

MR. PODLAS: Yes, Judge.

THE COURT: And, Counsel, did you?

MS. IRELAND: I did, Your Honor.

THE COURT: So I went through, and with the exhibits that were received, and with judicial notice of the case in which Mr. Podlas represented the Defendant on the very first degree assault that, you know, formed, I believe, the basis for the buccal swabbing, since he represented the Defendant it seemed fair that I should be able to take judicial notice of that fact, and so forth. So that I would have an understanding of what the exhibits that the State had disclosed to the defense already indicated and hopefully permit them, the defense having seen the preliminary analysis of the Court, to be able to articulate what it is in that process, if anything, he is challenging.

So, having said that, Mr. Podlas, I'd be happy to hear a brief opening statement.

You may be seated, sir.

This is Alonzo Jay King, case K09-0807. Is [6]that correct?

MS. IRELAND: It is, Your Honor. But before Mr. Podlas addresses the Court, if I might just ask the Court, my position, having read the Court's ruling, is that he's not entitled to this hearing. Unless he makes an initial proffer, a substantial proffer that there has been some intentional falsehood or some reckless indifference to the truth in either the warrant, initial warrant in this case, or in the Court granting the State's motion to compel and giving an order whereby Mr. King had to provide the second sample.

MR. PODLAS: Well, Judge, I have some problems with that characterization, okay?

THE COURT: Well, why don't -- okay, yes, I understand, but let's hear what it is that we're trying to do here today. Because it's not a motion in limine, right? It wasn't filed as a motion in limine, was it?

MR. PODLAS: No.

THE COURT: So I understand the State's concern, but I'll hear from the defense.

MR. PODLAS: Basically, Judge, we moved to suppress the DNA evidence in this case because it all derives from this hit in the CODIS system that [7] occurred from this DNA sample that supposedly was taken from Mr. King in his first degree assault in April

of '09. Our argument was that that was taken without a warrant and that, therefore, it was an unconstitutional search because taking of DNA has been deemed to be a search unless there was some justification.

The State's justification was that it was taken pursuant to the DNA Collection Act as recently amended.

Our position was twofold. Number one, our position was in general that that, that DNA Act, Collection Act as amended, was unconstitutional. And then, secondly, our position was that it was the State's burden to show that the taking of that DNA was justified without a warrant by showing that it was taken in accordance with that Act.

Your Honor reserved on whose burden it was and asked that we submit memorandum of law. I submitted a memorandum of law. The State did not.

THE COURT: Well, what happened was the State had requested an extension, but since I was not the judge who was scheduled to hear the hearing on the following day, and rather than have that judge go into an unresolved motion without the benefit of the [8] Court's preliminary solidification of the issues that were being presented, that I needed to resolve for the parties who had the burden. So I did it as a courtesy without having received the State's motion so that you would not be standing here in front of me today having been determined to have the burden and never having been so advised.

MR. PODLAS: I understand, Judge.

THE COURT: All right. Well, then I'm hearing you.

MR. PODLAS: And in that preliminary ruling, Your Honor reached the conclusion that it's the Defendant's burden to go forward with the challenge to the collection of that initial DNA swab. And that's why we are here this morning.

THE COURT: Right, okay. Call a witness.

MR. PODLAS: I would like to call the person from the Maryland State Police Forensics Division, Crime Lab -- I'm sorry, the custodian of records, what is her name?

MS. IRELAND: Michelle Groves.

THE COURT: And you're going to call her for what purpose?

MR. PODLAS: To question her with regard to the collection of the DNA sample.

[9] MS. IRELAND: The State is --

THE COURT: Are we doing a discovery motion, is that what this is? Or... I don't understand where you are going with the motion, so the burden is on you to show that there is something that was the equivalent of a violation, not a, I mean, this isn't a chain of custody hearing.

MR. PODLAS: No.

THE COURT: It's not a motion in limine.

MR. PODLAS: No.

THE COURT: So what is the constitutional challenge at this point in time?

MR. PODLAS: The constitutional challenge is that, my position was that if the State is going to take it without a warrant and pursuant to the DNA Collection Act they have to show the Act was complied with. Your Honor ruled that I had that burden of proof, and so I'm calling the witness.

THE COURT: No, no, I didn't say that you had the burden of proof. I said you have the burden of proof to establish that there is an unlawful search or seizure beyond the mere, beyond showing the facts that are set forth in my memorandum, do you contest the facts in my memorandum?

MR. PODLAS: I don't have it in front of me, [10] Judge.

THE COURT: Well, then I think you should, so I'll give you my copy. So what I determined was, if I recall correctly, was that, what the Act contemplates is a person who has been arrested, served with a charging document, there was a probable cause finding to believe that they committed the offense for which they are arrested. That is, in this case, or was, first degree assault.

The probable cause was in the finding that generated the arrest.

MR. PODLAS: You're talking about the first degree assault case?

THE COURT: Yes. And the legislature determined that if there is probable cause to arrest somebody for a first degree assault, that person can have a buccal swabbing, DNA sampling taken, because there was probable cause to believe that they committed the first degree assault, and that upon their initial appearance before the District Court that data can be entered.

MR. PODLAS: That's not all they determined, Judge.

THE COURT: Pardon me?

MR. PODLAS: That's not all they determined.

[11] THE COURT: So what are we taking evidence to show? Tell me what you're going to show after you present all your evidence.

MR. PODLAS: That the State hasn't complied with all of the requirements for taking it from someone who is merely charged and not convicted.

THE COURT: And how is that an unlawful search or seizure?

MR. PODLAS: Well, because if it's justified

without a warrant because it's pursuant to the DNA Collection Act, and if it's not done pursuant to the requirements of the DNA Collection Act, then it's not justified and therefore a warrant is required.

THE COURT: Okay. I don't agree with that analysis. I believe that it might be grounds to show that it was, that there is a motion in limine, somehow that there was a defect that it should, that the DNA shouldn't be submitted into evidence because it's not reliable, but it doesn't create, it doesn't cause a constitutional violation that there was an error, does it?

MR. PODLAS: Yes, Judge, because the DNA evidence that's going to come in at trial is not the DNA evidence from this initial buccal swab.

THE COURT: Right.

[12] MR. PODLAS: It was this initial buccal swab that led to the State's ability to get another sample which was tested, okay, but they wouldn't have gotten that sample if they hadn't gotten this initial buccal swab.

And my position is, and always had been, that the taking of DNA is a search, there has to be a warrant, if there is not a warrant there has got to be a legal justification. And they say the legal justification is the DNA Collection Act, and I'm simply saying they didn't comply with it.

THE COURT: Okay. You know, I just don't

think that, Ms. Ireland, any effort on my part will solidify the fact that, what it is he is trying to do.

Go ahead. The witness has come from Baltimore. I don't want to have another avenue develop after today to suggest that she should have to come back, so I'll hear everything that she has to say for whatever relevance that it might have.

And besides I assume he would have to proffer something.

So, come forward please.

MICHELE GROVES,

[13]a witness produced on call of the Defendant, having first been duly sworn, according to law, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PODLAS:

Q. Ma'am, could you state your full name for the record?

A. Michelle Groves, G-R-O-V-E-S.

Q. And whom are you employed by?

A. The Maryland State Police's Forensic Sciences Division.

Q. And you are the custodian of records there?

A. Yes, I am.

MR. PODLAS: If I could have these marked.

THE COURT: Did he provide you with copies of these in advance of this hearing?

MS. IRELAND: No.

THE COURT: Why don't you do so, Counsel?

MR. PODLAS: I didn't know I was required to provide her with a copy of the subpoena.

THE COURT: Oh, is it a subpoena?

MR. PODLAS: Yes.

THE COURT: Okay. If it's just a subpoena, that's okay. I thought they were exhibits.

(Subpoenas, were marked as Defendant's [14] Exhibit Nos. 1-2, for identification.)

BY MR. PODLAS:

Q. I'm going to show you what's been marked as D-1 and D-2 for identification, and ask you if you recognize those?

A. Yes, I do.

Q. And these were the subpoenas that were served upon the Forensics Division in connection with this case?

A. Yes, we did receive those.

MR. PODLAS: Judge, I would like to submit these into evidence at this time.

MS. IRELAND: No objection.

THE COURT: They're received.

(Subpoenas, were marked as Defendant's Exhibit Nos. 1-2, into evidence.)

BY MR. PODLAS:

Q. Ms. Groves, with respect to this case you've brought your entire file with regard to the records?

A. Yes, I brought paperwork.

Q. And with respect to the collection of the DNA sample initially in this case, what records do you have?

A. For the collection of the sample?

Q. Yes.

[15] A. I've got a copy of the card that was filled out at the time of collection.

Q. Could I see that?

THE COURT: You haven't seen her file yet, Counsel?

THE WITNESS: I provided him with a copy of that prior, actually.

THE COURT: All right.

MR. PODLAS: Well, I don't know whether it's something, they sent me some faxes.

THE WITNESS: It was in the information that was provided to you prior.

BY MR. PODLAS:

Q. And when was this sample taken?

A. April 10th, 2009.

Q. And who was the sample taken by?

A. Do you mean who collected the sample?

Q. Yes.

A. Down at the bottom right-hand corner it says it was an M.I. Jenkins.

Q. Who is M.I. Jenkins?

A. The person who collected the sample.

Q. What documentation do you have in your

records with respect to M.I. Jenkins in terms of their training, with respect to their training as to [16] the taking of DNA samples?

A. That person should have been trained through the facility --

Q. I'm not asking your opinion, I'm asking what documentation do you have in your file as to that person's training?

A. I don't have any documentation in my file.

Q. So there is nothing in your file that documents that this person was properly trained?

A. I don't have that information.

Q. And where was that sample taken?

A. Wherever M.I. Jenkins collected the sample.

Q. So you don't know where --

A. I have a collecting agency, ORI, that is listed on the card and...

Q. But you don't know where it was taken?

A. I believe that's Wicomico Central Booking, but I'm not a hundred percent certain. I have the agency listed by the CRI.

Q. And when was this sample submitted for

testing?

Do you have documentation as to that?

A. When did we receive the sample?

Q. No.

A. When did it... I don't --

[17] Q. Well, let's start with that. When did you receive the sample?

A. We processed the sample at the laboratory on April 23rd, 2009.

Q. Okay. And when you say you processed the sample, what does that mean?

A. A kit was received into the laboratory. We opened up the kit, looked at the components, put the buccal swabs in their storage area, and took the paper, which was this, and put it in its designated storage area.

Q. And when was the sample tested, what do your records show?

A. It was sent to the laboratory, our vendor laboratory on June 25th, 2009.

Q. And when was it tested? Do your records indicate when it was tested?

A. After June 25th, 2009. It was done by the vendor lab.

Q. And when was the data from that testing placed in the DNA data base?

A. July 13th, 2009.

Q. Now, coming back to the collection of the sample, do you have any documentation in your file as to any written notices that were given to Mr. King [18] when the sample was collected?

A. No, I do not.

Q. Is there anything in your file that indicates that there was any written notices given to Mr. King when the sample was collected?

A. No, there's not.

MR. PODLAS: That's all I have, Judge.

THE COURT: Do you have anything?

CROSS-EXAMINATION

BY MS. IRELAND:

Q. You are the custodian of records for all information processed in the CODIS system that's received by the Maryland State Police?

A. Yes, that's correct.

Q. In any file of any arrestee, do you receive paperwork from the collecting agency as to what, if any, notice, notice of rights is provided to the arrestee?

A. No.

MR. PODLAS: Judge, I'm going to object. I don't know what the relevance of that is. This has to do with what happened in this case, not what may have happened in other cases.

THE COURT: That's all right, I'm going to allow it, because I believe that as the custodian of [19] records the routine, the question of whether or not it is routine practice to make, retain, and so forth, records of that nature is permissible, so I'll permit it.

BY MS. IRELAND:

Q. So just to clarify, wherever the arrestee's sample is taken, Maryland State Police Custodian of Records receives no information from the collecting agency –

MR. PODLAS: Objection. She is leading the witness.

MS. IRELAND: I'm cross-examining.

Sorry, Your Honor.

THE COURT: It is cross-examination. So she does have the right to lead.

MS. IRELAND: Sorry.

THE COURT: Overruled.

I believe the question was, would it be, is it your practice to receive from the collecting agency documents reflecting the notice of the rights to Defendant that may have been issued at the time of collection.

Was that your question?

MS. IRELAND: Yes, Your Honor.

THE WITNESS: We do not receive such [20] documents.

MS. IRELAND: Court's indulgence.

BY MS. IRELAND:

Q. Do you, as a custodian of records for samples uploaded into the CODIS system, maintain any kind of documentation concerning the qualifications, or lack thereof, of the collecting agent for the arrestee's sample?

A. No, we do not maintain that documentation or those records.

Q. Thank you.

MS. IRELAND: That's all I have of from this witness.

REDIRECT EXAMINATION

BY MR. PODLAS:

Q. Are you familiar, Ms. Groves, with the requirements of the DNA Collection Act as amended in 2008?

MS. IRELAND: Objection. Outside the scope.

THE COURT: I'll ask her if she knows, I'll let her answer if she knows anything about that. Do you know anything about those requirements?

THE WITNESS: I'm familiar with the law that was passed for the, you know, on January 1, 2009.

[21] BY MR. PODLAS:

Q. And are you familiar with the fact that a requirement of the amended Act is that the Defendant be given certain notices when DNA is collected?

MS. IRELAND: Objection. Leading.

THE COURT: Well, it's a question of law. It's sustained.

MR. PODLAS: I don't have anything further, Judge.

THE COURT: Anything further?

MS. IRELAND: No, Your Honor.

THE COURT: Thank you.

MS. IRELAND: And may I ask her just to, since I don't know what else is going to be presented, may I ask her to remain?

THE COURT: Well, you're still a witness. You're not sequestered. But please don't leave yet. Your testimony may be needed at a subsequent time, before twelve o'clock.

THE WITNESS: Okay, thank you.

THE COURT: Thank you.

Your next witness, Mr. Podlas?

MR. PODLAS: I don't have any other further witnesses, Judge.

THE COURT: Rebuttal? Or any witnesses for [22] the State of Maryland?

MS. IRELAND: Your Honor, given the Court's ruling that the burden of proof is on the Defendant to establish, if I understand the Court's initial memorandum, that there has been some irregularity or false, intentional falsehood, I don't believe that anything has been generated that I would need to respond to.

THE COURT: All right. So I will hear argument from you, Counsel.

MR. PODLAS: Judge, basically, my argument is this. In the absence of a warrant, using the DNA Collection Act, the sample can be taken without a warrant under certain circumstances where a person is charged with a, a first degree assault in this case. However, it is not simply the law that because they're charged with a qualifying crime you can take a DNA sample. The law is that when they're charged with a qualifying crime, you can take a sample from them in accordance with the requirements of this Act.

Now, the requirements of this Act have certain protections for the samplee prior to its amendment in 2008. When it was amended in 2008, okay, the legislature added additional provisions to the Act, the Act's requirements; for instance, they [23] added the provision that when the sample is taken, okay, and this is in Section 2-504 (3) (ii), and this is brand new to the Act when they amended it in 2008, at the time of the collection of the DNA sample the individual from whom the sample is collected shall be given notice that the DNA record may be expunged and the DNA sample destroyed in accordance with Section 511 of this subtitle. That wasn't done here.

THE COURT: How do I know that?

MR. PODLAS: How do you know it? Because there is no evidence in the file of the State Police Crime Lab Forensic Sciences Division who is charged under this law with these procedures.

THE COURT: Okay.

MR. PODLAS: In addition to that, there was other amendments made to the Act at the same time, okay, requiring it to be processed within certain timeframes, I think that was done here, okay? Requiring it to be taken from the individual at a facility specified by the secretary. Okay. And there is also provisions in the Act, and they were in the Act before the amendment, that said that the collection of the DNA sample must be by someone who is trained in the collection procedures that the Crime Laboratory uses.

[24] There is no evidence in those records, and they're charged with this responsibility, that this M.I. Jenkins who took the sample, who they don't even really know who they are, there is no evidence that that person is trained in accordance with the requirements of the Act.

THE COURT: All right. Is there any evidence that they're not?

MR. PODLAS: Judge, this is why I didn't understand the shifting of the burden of proof, but let me address that by saying this. It is the State Police Crime Lab Forensics Division that is charged under the statute for complying with the requirements of the statute. The burden of proof shifted to me, I subpoenaed those records, it's not in there. If it's not in there, then I think that the Court has to find that there is no proof that it was taken by somebody trained in the procedures as required by the statute.

THE COURT: Well, don't you have to prove

that it was not taken in accordance with --

MR. PODLAS: I'm sorry?

THE COURT: But aren't you charged with showing that it was somehow not taken in accordance with those procedures, not just affirmatively that the record doesn't reflect whether it was or not, [25] don't you have to show that it was not? And not only that it was not, but it wasn't just a minor error or a technical glitch, that it somehow rose to the level of an intentional violation of the Defendant's rights and that it was done so either, you know, that what we have here is that there was a reckless falsity and a representation to the Court that generated the order of court, which allowed the new buccal swab to be taken so that it could be submitted for DNA analysis.

MR. PODLAS: Well, Judge, I don't have the burden of proving that it wasn't done and it wasn't done because of X, Y and Z. What I have the burden of proving is that the Act wasn't complied with. And the Act wasn't complied with.

THE COURT: Well, but you have the burden of proving that it wasn't complied with as opposed to showing that this person who has the records that she does can't establish whether it was or not. I mean, there is a difference --

MR. PODLAS: But they're the ones charged with the responsibility under the Act.

THE COURT: I understand what your

argument is. But I'm just saying, do you have any evidence from any of that, because you have the records and I [26] do not, that it was not complied with, other than the fact that there is an absence of any records in her file?

MR. PODLAS: The absence of records as to the training of the collector and there is an absence of any evidence of the service of the required notice that's set forth in the statute.

THE COURT: Okay. All right.

Do you want to be heard?

MS. IRELAND: Just very briefly, Your Honor.

In fact, it is the law that a person charged with a qualifying crime can be subjected to the taking of a buccal swab for uploading, for processing and uploading into Maryland's statewide DNA Data Base. And it is not the State's burden to establish that the procedures were done correctly, as the Court's memorandum has elucidated.

And I would assert to the Court that the fact that the custodian of records at the Maryland State Police has no information on the collector qualifications or the notice to the Defendant, doesn't have anything to do with whether or not that was done. Certainly if there were some irregularities, then Mr. Podlas would need to pursue that in subpoenaing the collector from the collecting [27] agency, which he knows from before is the Wicomico County Detention Center. And there

has not been any evidence placed on the record that there was anything done irregularly. But that isn't even the issue. The issue is, he would have to make a proffer under the, I believe it's the Franks case, he would have to make a proffer that something had been -- in the State's position, the Court has been very indulgent with Mr. Podlas, he would have to make a proffer that something had been done irregularly in order to have the opportunity to have the hearing that he just had.

THE COURT: Well, my understanding from Counsel's representation when we were here back on February 12, 2010, was that the Defendant, had he testified, was going to say it wasn't, they never did take a buccal swab from me, so all of this was somehow concocted. But he never testified that day, nor did he testify that he didn't receive any notice, nor did he testify as to any of those other foundational matters that the defense has presented to me in a proffer. But I don't accept a proffer without an actual showing that that's what the evidence is. And I haven't heard it. So I suppose that, in my mind, I was leaving the option for the defense open to generate that it had, in fact, it [28] could establish what it said on the record at the original hearing they intended to show.

MR. PODLAS: Judge, I can call him to the stand right now to testify to that. I don't think that's my burden.

THE COURT: All right. We had the hearing. I gave you every opportunity. I have given you two

hearings to have the opportunity. And I gave the memorandum. And I stated in the memorandum what the burden was.

So, having given the State and defense all the, other than doing it for the defense, which I don't think I'm required to do, I've done every consideration available, so I'm going to go ahead and deny the motion to suppress.

MS. IRELAND: Thank you, Your Honor.

(End of Proceedings.)

JA 83

IN THE COURT OF APPEALS

OF MARYLAND

No. 68

September Term, 2011

ALONZO JAY KING, JR.

v.

STATE OF MARYLAND

Bell, C.J.,
Harrell
Greene
Adkins
Barbera
Wilner, Alan M. (Retired,
Specially Assigned)
Cathell, Dale R. (Retired,
Specially Assigned),

JJ.

Opinion by Harrell, J.
Barbera and Wilner, JJ., dissent.

Filed: April 24, 2012

We consider here facial and as-applied constitutional challenges to that portion of the Maryland DNA Collection Act (the "Act") that purports to authorize State and local law enforcement authorities to collect DNA[1] samples from individuals who are arrested for a crime of violence,[2] an attempted crime of violence, a burglary, or an attempted burglary. Maryland Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-504(a)(3). Appellant, Alonzo Jay King Jr., was arrested in 2009 on first- and second-degree assault charges. Pursuant to § 2-504(a)(3) of the Act, King's DNA was collected, analyzed, and entered into Maryland's DNA database. King was convicted ultimately on the second-degree assault charge but, pending his trial on that charge, his DNA profile generated a match to a DNA sample collected from a sexual assault forensic examination conducted on the victim of an unsolved 2003 rape. This "hit" provided the sole probable cause for a subsequent grand jury

---

[1] DNA means deoxyribonucleic acid. Maryland Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-501(g). DNA is the carrier of genetic information that comprises chromosomes and is individual to each person, aside from identical twins. For a comprehensive review of the science behind DNA, see *Armstead v. State*, 342 Md. 38, 673 A.2d 221 (1996).

[2] Crime of violence" means any enumerated crime in § 14-101 of the Criminal Law Article, including first-degree assault. Meaningfully for the present case, second-degree assault is not an enumerated crime of violence. Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-501(e).

indictment of King for the rape. A later-obtained search warrant ordered collection from King of an additional reference DNA sample, which, after processing and analysis, matched also the DNA profile from the 2003 rape. King was convicted of first-degree rape and sentenced to life in prison.

Although previously we upheld the constitutionality of the Act, as applied to convicted felons, in *State v. Raines*, 383 Md. 1, 857 A.2d 19 (2004), the present case presents an extension of the statute, not present in *Raines*. Thus, we evaluate here rights given to, and withdrawn from, citizens who have been arrested, including the right to be free from unreasonable searches and seizures. Under the totality of the circumstances balancing test, see *United States v. Knights*, 534 U.S. 112, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001), we conclude, on the facts of this case, that King, who was arrested, but not convicted, at the time of his first compelled DNA collection, generally has a sufficiently weighty and reasonable expectation of privacy against warrantless, suspicionless searches that is not outweighed by the State's purported interest in assuring proper identification of him as to the crimes for which he was charged at the time. The State (through local law enforcement), prior to obtaining a DNA sample from King following his arrest on the assault charges, identified King accurately and confidently through photographs and fingerprints. It had no legitimate need for a DNA sample in order to be confident who it arrested or to convict him on the first-or second-degree assault charges. Therefore, there was no probable cause or individualized suspicion supporting obtention of the DNA sample

collection for those charges. We conclude that the portions of the DNA Act authorizing collection of a DNA sample from a mere arrestee is unconstitutional as applied to King. Although we have some trepidation as to the facial constitutionality of the DNA Act, as to arrestees generally, we cannot exclude the possibility that there may be, in some circumstances, a need for the State to obtain a DNA sample to identify an arrestee accurately.

I. Factual and Procedural Background

The tale of this case began on 10 April 2009, when appellant was arrested in Wicomico County, Maryland, on first- and second-degree assault charges unrelated to the rape charge underlying the prosecution of the present case.[3] Prior to the disposition of the assault charges, because King was charged with a crime of violence, the Act authorized collection of a DNA sample. Personnel at the Wicomico County Central Booking facility used a buccal swab to collect a DNA sample[4] from King on the day of his arrest.[5] The

---

[3] King entered an Alford plea and was found guilty in the Circuit Court for Wicomico County on 16 September 2009 of one misdemeanor count of second-degree assault stemming from his 10 April 2009 arrest. The first-degree assault charges were entered nolle prosequi. He was sentenced to four-years' imprisonment, with all but one year suspended.

[4] DNA sample, under the Act, means:

(continued...)

sample was received and processed by the Maryland State Police Forensic Sciences Division and later analyzed by a private vendor laboratory. On 13 July

---

[4](...continued)

> a body fluid or tissue sample that is: (1) provided by an individual who is convicted of a felony or a violation of § 6-205 or § 6-206 of the Criminal Law Article; (2) provided by an individual who is charged with: (i) a crime of violence or an attempt to commit a crime of violence; or (ii) burglary or an attempt to commit burglary; or (3) submitted to the statewide DNA data base system for testing as part of a criminal investigation.

Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-501(i).

[5] A buccal swab DNA collection requires the collector to swab up-and-down and rotate a sterile cotton swab on the interior of the cheek in the subject's mouth, with enough pressure to remove cells. This process is repeated on the other cheek with a separate cotton swab. Forensic Sci. Div., Md. State Police, Guidelines for Submitting Physical Evidence (2010), available at http://icac.mdsp.org/downloads/FSDSubmissionGuide.pdf.

2009, the DNA record[6] was uploaded to the Maryland DNA database. Detective Barry Tucker of the Salisbury Police Department received notice from the State Police, on 4 August 2009, that there had been a "hit" on King's DNA profile in an unsolved rape case.

The DNA database "hit" identified King's DNA profile as a match to a profile developed from a DNA sample collected in a 2003 unsolved rape case in Salisbury, Maryland. In that case, on 21 September 2003, an unidentified man broke into the home of Vonette W., a 53-year-old woman. The man, wearing a scarf over his face, a hat pulled over his head, and armed with a hand gun, entered Vonette W.'s bedroom, and ordered her not to look at him. While holding the gun to her head, he raped Vonette W. After the rape, he left with Vonette W.'s purse. Vonette W. called immediately her daughter for help. Salisbury Police officers arranged for the victim to be transported to Peninsula Regional Medical Center, where she underwent a sexual assault forensic examination. Semen was collected from a vaginal swab. The swab

---

[6] DNA record, under the Act, means "DNA information stored in CODIS or the statewide DNA data base system" and "includes the information commonly referred to as a DNA profile." Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-501(h). CODIS means "the Federal Bureau of Investigation's "Combined DNA Index System" that allows the storage and exchange of DNA records submitted by federal, state, and local forensic DNA laboratories." Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-501(c).

was processed and the DNA profile uploaded to the Maryland DNA database. No matches resulted at that time. Vonette W. was unable to identify the man who attacked her other than to say that he was African-American, between 20 and 25 years old, five-foot-six inches tall, and with a light-to-medium physique. Police searched the area around the victim's home and conducted interviews, but were unable to identify the attacker.

Detective Tucker presented the 4 August 2009 DNA database "hit" to a Wicomico County grand jury which, on 13 October 2009, returned an indictment against King for ten charges arising from the crimes committed against Vonette W., including first-degree rape.[7] The DNA database "hit" was the only evidence of probable cause supporting the indictment. On 18 November 2009, Detective Tucker obtained a search warrant and collected a second buccal swab from King. The second buccal swab matched also the sample collected from Vonette W. during the 2003 sexual assault forensic examination.

King filed in the Circuit Court for Wicomico County an omnibus motion that included a request to suppress evidence obtained through an illegal search and

---

[7] The complete list of charges included: first-degree burglary, third-degree burglary, first-degree rape, attempted first-degree rape, second-degree rape, attempted second-degree rape, armed robbery, robbery, handgun use in a violent crime, and carrying a handgun.

seizure.[8] On 12 February 2010, the Circuit Court held a hearing on the motion. The thrust of King's argument was that the DNA Act could not survive scrutiny under the Fourth Amendment and therefore King's arrest was invalid.[9] He argued also that the State did not collect King's first DNA sample in accordance with the procedures specified by the DNA Act and, therefore, that the indictment for the charges arising from the 2003 rape was invalid. The hearing judge solicited memoranda of law on the illegal search-and-seizure issue raised at the hearing.[10]

---

[8] This Court has criticized omnibus boilerplate motions filed routinely on behalf of defendants in criminal cases as containing unsupported "bald allegations." *See Jones v. State*, 395 Md. 97, 103 n.3, 909 A.2d 650, 655 n.3 (2006); *Denicolis v. State*, 378 Md. 646, 660-61, 837 A.2d 944, 953-54 (2003). King's omnibus defense motion requested vaguely suppression of "[e]vidence seized in this case . . . as a result of an illegal search and seizure." At both motions hearings, however, King articulated a Fourth Amendment violation as the critical illegal search and seizure and requested suppression specifically of his DNA sample. Therefore, the issue before us was preserved properly.

[9] King argued alternatively, but without much force, that DNA was not collected actually from him on 10 April 2009, after his arrest.

[10] King submitted a memorandum; the State did not.

On 26 February 2009, the hearing judge issued a memorandum opinion denying King's motion to suppress. The memorandum opinion upheld the constitutionality of the Maryland DNA Collection Act's authorization to collect DNA from arrestees, citing to this Court's holding in *State v. Raines*, 383 Md. 1, 857 A.2d 19 (2004), and concluded that the arrest of King on the 2009 assault charges and seizure of his DNA were presumed lawful; therefore, the defense bore the burden to prove that the warrant for the second DNA sample was invalid. The judge noted the analysis in *Fitzgerald v. State*, 153 Md. App. 601, 638, 837 A.2d 989, 1010 (2003) (citing *Franks v. Delaware*, 438 U.S. 154, 160, 98 S. Ct. 2674, 2678, 57 L. Ed. 2d 667, 675 (1978)), *aff'd* 384 Md. 484, 864 A.2d 1006 (2004), which lead to a conclusion that when a defendant challenges a warrant outside of its "four corners," the burden shifts to the defendant to demonstrate, by a preponderance of the evidence, that the State's supporting factual allegations to obtain the warrant are tainted by "deliberate falsehood or with reckless disregard for the truth." Because King did not allege or present evidence of falsehood or reckless disregard for the truth, the hearing judge concluded King had not met his burden under *Franks*.

On 26 March 2010, the same judge presided over a second hearing on King's motion to suppress in order to allow King to present evidence that the warrant was based on falsehood or reckless disregard for the truth. King called Michelle Groves, custodian of the Maryland State Police Forensics Division Crime Lab, as a witness. In an attempt to show that the State could not prove that all predicate requirements for

collection of a DNA sample under the Maryland DNA Collection Act (i.e., collection must be completed by an approved person[11]) were observed and therefore the warrant based on that sample was invalid, King questioned Groves about the handling and custody of the first DNA sample. Groves could not provide any records of the training or qualifications of the person who collected King's first DNA sample and could not provide affirmative evidence that King was given a required notice about the Act's expungement provisions.[12] The State countered that King had not adduced any evidence of error or irregularity in the DNA collection procedures. The hearing judge concluded that King failed to meet his burden under *Franks* and denied again the motion to suppress.

Ultimately, King plead not guilty to the charges arising from the 2003 rape of Vonette W., on an agreed statement of facts, in order to preserve his right to appeal the constitutional issues he raised. King was convicted and sentenced to life in prison, without the possibility of parole. On 12 October 2010, King filed timely a notice of appeal to the Court of Special Appeals, but we issued a writ of certiorari on our initiative, *King v. State*, 422 Md. 353, 30 A.3d 193 (2011), before the intermediate appellate court could

---

[11] Collection procedures, under the Act, are described in Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-504(b), (c).

[12] Expungement provisions, under the Act, are described in Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-511.

decide the appeal. Appellant poses two questions for our consideration:

> 1. Did the trial court err by denying Appellant's motion to suppress DNA evidence obtained through a warrantless search conducted without any individualized suspicion of wrongdoing?
>
> 2. Did the court below improperly shift the burden of proof to the defense to demonstrate that a search or seizure made without individualized suspicion is unreasonable?

We hold that § 2-504(a)(3) of the Maryland DNA Collection Act, which allows DNA collection from persons arrested, but not yet convicted, for crimes of violence and burglary, is unconstitutional, under the Fourth Amendment totality of the circumstances balancing test, as applied to the relevant facts of this case because King's expectation of privacy is greater than the State's purported interest in using King's DNA to identify him for purposes of his 10 April 2009 arrest on the assault charges. Concluding that, in King's circumstances, his DNA was collected unconstitutionally, and the evidence presented at trial should have been suppressed as "fruit of the poisonous tree," we do not reach King's second question as it becomes moot. Accordingly, we reverse the judgment of the Circuit Court for Wicomico County and remand the case to that court for a new trial, consistent with the views expressed in this opinion.

II. Standard of Review

Reviewing a trial court's disposition of a motion to suppress evidence, we view the evidence presented at the hearing, along with any reasonable inferences drawable therefrom, in a light most favorable to the prevailing party, which, in the present situation, was the State. *Bailey v. State*, 412 Md. 349, 363, 987 A.2d 72, 80 (2010) (citing *Crosby v. State*, 408 Md. 490, 504, 970 A.2d 894, 902 (2009); *Longshore v. State*, 399 Md. 486, 498, 924 A.2d 1129, 1135 (2007)). The reviewing court defers to the fact-finding of the hearing court, unless the findings are erroneous clearly. *Id.* We apply, however, a non-deferential standard of review when making the ultimate legal determination as to whether the evidence was seized properly under the Fourth Amendment. *Williamson v. State*, 413 Md. 521, 532, 993 A.2d 626, 632 (2010) (citing *Bailey*, 412 Md. at 362, 987 A.2d at 80; *Crosby*, 408 Md. at 504-05, 970 A.2d at 902).

III. Discussion

Appellant argues that the Fourth Amendment protects mere arrestees, who are cloaked with the assumption of innocence until proven guilty, from unreasonable, warrantless, and suspicionless seizures and searches of their genetic material made pursuant to the Maryland DNA Collection Act. King maintains that the Maryland DNA Collection Act is unconstitutional facially under the Fourth Amendment, and also that the statute is invalid as applied to the facts of his case. The State counters that there is an overriding governmental interest in

identifying arrestees accurately, that DNA profiles developed from arrestees under the Maryland DNA Collection Act are used only for identification purposes (under an expansive view of what constitutes "identification"), and that arrestees have no expectation of privacy in their identity.

A. The Fourth Amendment

The Fourth Amendment to the United States Constitution provides,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment is applicable to Maryland through the Fourteenth Amendment. *See Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691, 6 L. Ed. 2d 1081, 1090, 86 Ohio Law Abs. 513 (1961); *Owens v. State*, 322 Md. 616, 622, 589 A.2d 59, 61 (1991). We evaluate Fourth Amendment challenges under the reasonableness test articulated by Justice Harlan in his concurring opinion in *Katz v. United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 516, 19 L. Ed. 2d 576, 587-88 (1967), a standard adopted by this Court in *Venner v. State*, 279 Md. 47, 51-52, 367 A.2d 949, 952 (1977). The *Katz* reasonableness test requires first that the person have an "actual (subjective)

expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" 389 U.S. at 361, 88 S. Ct. at 516, 19 L. Ed. 2d at 587-88 (Harlan, J., concurring). A seizure or search will be upheld even if there is a reasonable expectation of privacy when the government has a "special need." *See Griffin v. Wisconsin*, 483 U.S. 868, 875, 107 S. Ct. 3164, 3169, 97 L. Ed. 2d 709, 718 (1987) (upholding a warrantless search of a probationer because the government had a "special need" for the "exercise of supervision to assure that restrictions are in fact observed"); *Skinner v. Ry. Labor Execs. Ass'n.*, 489 U.S. 602, 633, 109 S. Ct. 1402, 1422, 103 L. Ed. 2d 639, 670 (1989) (upholding warrantless and suspicionless alcohol and drug test for railway employees). The State does little more than mention the special needs exception in the present case, for good reason, because its narrow confines do not embrace the case at bar.

The context for evaluating the Fourth Amendment challenges where a reasonable expectation of privacy competes with government interests was set forth by the Supreme Court in *United States v. Knights*, 534 U.S. 112, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001). In Knights, the Supreme Court upheld a warrantless search of a probationer's apartment, using the "totality of the circumstances" approach set forth in *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S. Ct. 417, 421, 136 L. Ed. 2d 347, 354 (1996). *Knights*, 534 U.S. at 118, 122 S. Ct. at 591, 151 L. Ed. 2d at 505. Reasonableness in a Fourth Amendment analysis is determined

> by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate government interests.

Knights, 534 U.S. at 118-19, 122 S. Ct. at 591, 151 L. Ed. 2d at 505 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300, 119 S. Ct. 1297, 1300, 143 L. Ed. 2d 408, 414 (1999)). The Court considered as weighty Knights's status as a probationer, which "like incarceration, is a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty." *Knights*, 534 U.S. at 119, 122 S. Ct. at 591, 151 L. Ed. 2d at 505 (citing *Griffin*, 483 U.S. at 874, 107 S. Ct. at 3168, 97 L. Ed. 2d at 717) (internal quotation omitted). Probation, noted the Court, was one point on a continuum of punishments for convicted criminals whose freedoms may be curtailed beyond those of law-abiding citizens. *Id.* Further, Knights's probation order stated clearly that warrantless searches were a condition of his probation; therefore, the Court concluded his expectation of privacy was diminished. *Knights*, 534 U.S. at 119-20, 122 S. Ct. at 591-92, 151 L. Ed. 2d at 505.

On the other side of the "totality of the circumstances" scale from the individual's privacy interest is the government interest in conducting the search. In Knights's situation, the government had a legitimate interest in his rehabilitation and protecting society from future criminal actions. *Knights*, 534 U.S. at 119, 122 S. Ct. at 591-92, 151 L. Ed. 2d at 505. The high recidivism rate of probationers fueled a strong

government interest that weighed heavily against Knights's diminished expectation of privacy. *Knights*, 534 U.S. at 120, 122 S. Ct. at 592, 151 L. Ed. 2d at 506 (noting a Justice Department report that found 43% of probationers were re-arrested for a felony within three years of release). The Court concluded that the government had a legitimate interest in preventing future crimes committed by probationers by conducting warrantless searches of probationers' residences. *Knights*, 534 U.S. at 121, 122 S. Ct. at 592, 151 L. Ed. 2d at 506. Balancing Knights's reduced expectation of privacy as a probationer against the government's interests in preventing recidivism and protecting the public, the Court observed that less than "probable cause" (in the form of reasonable suspicion, rather than individualized suspicion) was required for a search of Knights's residence. *Id.*

The Supreme Court deployed later the *Knights* "totality of the circumstances" test to determine whether a suspicionless search of a parolee, conducted by a police officer on a public sidewalk, was reasonable under the Fourth Amendment. *Samson v. California*, 547 U.S. 843, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (2006). The Court concluded that, on the continuum of punishments imposed for criminal violations, a parolee has "fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation . . . ." *Samson*, 547 U.S. at 850, 126 S. Ct. at 2198, 165 L. Ed. 2d at 258. Parolees are subject to a wide range of conditions for their release, including mandatory drug tests, restrictions on personal associations and activities, psychiatric treatment, residence approval, and mandatory meetings with

parole agents. *Samson*, 547 U.S. at 851, 126 S. Ct. at 2199, 165 L. Ed. 2d at 259. As in *Knights*, *Samson* focused heavily on the high recidivism rate of the parolee population, which, in California during the relevant time, approached 70 percent. *Samson*, 547 U.S. at 853, 126 S. Ct. at 2199, 165 L. Ed. 2d at 259. The Court concluded that the government interest in re-integrating parolees, protecting society from future criminal actions, along with a statutory prohibition against "arbitrary, capricious, or harassing" searches, outweighed the parolee's diminished expectation of privacy under the "totality of the circumstances." *Samson*, 547 U.S. at 856, 126 S. Ct. at 2202, 165 L. Ed. 2d at 262.

B. The Maryland DNA Collection Act

The Maryland DNA Collection Act was enacted in 1994. The portions of the current statute challenged by Appellant were added in 2008.[13] 2008 Md. Laws 337. The stated purpose of the statute is to "analyze and type the genetic markers contained in or derived from the DNA samples;" to assist an official

---

[13] The amendments to the Maryland DNA Collection Act directed to arrestees are subject to sunset provisions. Absent affirmative action from the Legislature to re-enact them, §§ 2-501, 2-504, 2-505, 2-506, 2-511, 2-512, 2-513, and 2-514 will be abrogated on 31 December 2013 and replaced with sections that do not permit DNA collection from arrestees. The current provisions for collection of DNA from convicted felons, however, will remain.

investigation of a crime; to identify human remains; to identify missing persons; and for "research and administrative purposes," including the development of a population database[14] and to aid in quality assurance. Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-505. The 2008 amendments affected primarily § 2-501(i), Definitions[15] and § 2-504,

---

[14] Population database means "a collection of DNA profiles, usually grouped by race, used for statistical evaluation, research, quality control, and protocol development of forensic DNA analysis methods." No personal identifying information is used in the population database. Md. Code Regs. 29.05.01.01(B)(25) (2011).

[15] § 2-501. Definitions.

> (i) DNA sample. -- "DNA sample" means a body fluid or tissue sample that is: (1) provided by an individual who is convicted of a felony or a violation of § 6-205 or § 6-206 of the Criminal Law Article; (2) *provided by an individual who is charged with: (i) a crime of violence or an attempt to commit a crime of violence; or (ii) burglary or an attempt to commit burglary; or* (3) submitted to the statewide DNA data base system for testing as part of a criminal investigation. Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-501(i) (emphasis added to 2008 amended text).

Collection of DNA Samples.[16] 2008 Md. Laws 337.

---

[16] The text added to § 2-504 that is relevant to the present case was:

> (3) (i) In accordance with regulations adopted under this subtitle, a DNA sample shall be collected from an individual who is charged with: 1. a crime of violence or an attempt to commit a crime of violence; or 2. burglary or an attempt to commit burglary. (ii) At the time of collection of the DNA sample under this paragraph, the individual from whom a sample is collected shall be given notice that the DNA record may be expunged and the DNA sample destroyed in accordance with § 2-511 of this subtitle.(iii) DNA evidence collected from a crime scene or collected as evidence of sexual assault at a hospital that a law enforcement investigator considers relevant to the identification or exoneration of a suspect shall be tested as soon as reasonably possible following collection of the sample.
> (d) Testing of sample from individual charged with crime under subsection (a)(3). --
> (1) A DNA sample collected from an individual charged with a crime under subsection (a)(3) of this section may not

(continued...)

[16](...continued)
be tested or placed in the statewide DNA data base system prior to the first scheduled arraignment date unless requested or consented to by the individual as provided in paragraph (3) of this subsection.
(2) If all qualifying criminal charges are determined to be unsupported by probable cause: (i) the DNA sample shall be immediately destroyed; and (ii) notice shall be sent to the defendant and counsel of record for the defendant that the sample was destroyed.
(3) An individual may request or consent to have the individual's DNA sample processed prior to arraignment for the sole purpose of having the sample checked against a sample that: (i) has been processed from the crime scene or the hospital; and (ii) is related to the charges against the individual.
(e) Second DNA sample. -- A second DNA sample shall be taken if needed to obtain sufficient DNA for the statewide DNA data base system or if ordered by the court for good cause shown.
(f) Failure to provide DNA sample. -- Failure of an individual who is not sentenced to a term of imprisonment to provide a DNA sample within 90 days

(continued...)

The amendments purport to allow the State to collect DNA samples from individuals arrested for crimes (or attempted crimes) of violence or burglary prior to being found guilty or pleading guilty. Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-504(a)(3). DNA samples are collected from arrestees when the individual is charged (or at a correctional facility if the arrestee is in custody) by an authorized collector trained in the collection protocols used by the Maryland State Police Crime Laboratory. Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-504(c). Samples may be collected with reasonable force, if necessary, and are mailed to the Maryland State Police Crime Laboratory within 24 hours of collection. Md. Code Regs. 29.05.01.04(C) & (M) (2011). The samples are not tested or placed in the statewide DNA system until the first scheduled arraignment of the arrestee, or earlier if the arrestee gives consent. Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-504(d).

DNA samples are analyzed in accordance with FBI standards and CODIS requirements. Md. Code Regs. 29.05.01.09(A) (2011). In the present case, King's DNA samples were sent to an approved vendor laboratory for analysis. While the specific type of scientific analysis to be employed is not prescribed by the statute, the polymerase chain reaction ("PCR") method is used commonly by laboratories to analyze DNA

---

[16](...continued)
after notice by the Director is a violation of probation. Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-504.

samples. Mary McCarthy, *Am I My Brother's Keeper?: Familial DNA Searches in the Twenty-first Century*, 86 Notre Dame L. Rev. 381, 384 (2011). In DNA analyses performed to comply with FBI/CODIS standards, PCR is used to replicate 13 core short-tandem-repeat loci. *Id.* These 13 loci were chosen by the FBI for CODIS, in response to congressional concern over privacy protections, because they are considered "non-coding" DNA that are thought not to reveal private information.[17] H. Rep. 106-900(I), at 27 (2000) (codified at 42 U.S.C. §§ 13701-14223 (2012)) (stating that the records do not "reveal information relating to any medical condition or other trait"). Once the DNA sample is analyzed, the DNA record (a numerical representation of the information at each loci) is uploaded to the statewide searchable DNA electronic database or the FBI CODIS database. No identifying information, criminal history, photographs, or fingerprints are stored supposedly alongside the DNA record in either DNA database. CODIS and DNIS Fact Sheet, Fed. Bureau of Investigation, http://www.fbi. gov/about-us/lab/codis/codis-and-ndis-fact-sheet (last visited 19 April 2012). When the DNA database produces a match (a "hit") between an arrestee's sample and one stored previously in a database, the Maryland State Police notify the law

---

[17] There is, however, considerable current debate as to whether these "non-coding" or "junk" DNA provide no predictive genetic information. See Simon A. Cole, *Is the "Junk" DNA Designation Bunk?*, 102 Nw. U. L. Rev. 54, 54 (2007) (highlighting an academic debate on the significance of non-coding DNA).

enforcement officer who provided the sample. The original sample "hit" may be used thereafter only as probable cause to obtain a warrant to obtain a second sample and is not admissible as evidence at trial. Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-510.

If an arrestee is not convicted of the charge or charges which lead to his/her qualifying arrest(s), the DNA samples and records are required to be destroyed or expunged by the authorities. Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-511(a). There is no expungement allowed, however, if the precipitating charge or charges against an arrestee are placed on the stet docket or the arrestee received probation before judgment. Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-511(f)(2). The Act provides also for penalties for misuse of DNA records, unauthorized testing of DNA samples, or wilful failure to destroy DNA samples. Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-512.

In *Raines*, 383 Md. at 25, 857 A.2d at 33, a plurality of this Court upheld the constitutionality, against a Fourth Amendment challenge, of the then-extant DNA collection statutory scheme, which, prior to the 2008 amendments, provided for collection of DNA samples only from individuals convicted of felonies, fourth-degree burglary, or breaking and entering into a vehicle. The Court, however, was divided deeply in reaching that result. The plurality opinion was authored by Judge Cathell. Two members of the four judge majority authored separate concurring opinions.

Raines was convicted of two separate robberies committed in 1996. In 1999, while serving a sentence in prison for a crime unrelated to the robberies, his DNA was collected pursuant to the Act as it then existed, because the 1996 robberies were qualifying felonies. *Raines*, 383 Md. at 5 n.5, 857 A.2d at 22 n.5 (plurality opinion). In 2002, the DNA profile from a 1996 unsolved rape was uploaded to the statewide database and found to match Raines's DNA profile collected in 1999. *Raines*, 383 Md. at 6, 857 A.2d at 22 (plurality opinion). Using the DNA database hit as probable cause, the State obtained a search warrant to obtain a saliva sample from Raines in February 2003. *Raines*, 383 Md. at 6-7, 857 A.2d at 22 (plurality opinion). As a result of the second DNA profile match and the testimony of the 1996 rape victim, a grand jury returned an indictment against Raines for first- and second-degree rape and robbery. *Raines*, 383 Md. at 7, 857 A.2d at 22 (plurality opinion). Prior to his trial on the rape charges, Raines moved to suppress the DNA evidence, asserting that the original search was unconstitutional. *Raines*, 383 Md. at 7, 857 A.2d at 23 (plurality opinion). The motions court agreed. *Id.* The plurality opinion, on appeal, reversed the suppression of the evidence, noting that nearly every federal and state court that had decided an analogous question upheld against Fourth Amendment attack the collection of DNA from convicted felons. *Raines*, 383 Md. at 12, 857 A.2d at 25 (plurality opinion). Using the balancing test for determining whether a search is reasonable under the Fourth Amendment, the plurality upheld the constitutionality of the Maryland DNA Collection Act, as applied to convicted felons. *Raines*, 383 Md. at 18, 857 A.2d at 29.

On the privacy interest side of the scales of the balancing test, the Court considered Raines's status as a convicted and incarcerated person as one with "severely diminished expectation of privacy." *Raines*, 383 Md. at 25, 857 A.2d at 33 (plurality opinion). The plurality opinion diluted further Raines's expectation of privacy by crediting that the purpose of the DNA collection was to "identify" convicted felons; no incarcerated individual has an expectation of privacy in his or her identity. *Id.* The Court distinguished the interest in searching for "identification" from searching "ordinary individuals for the purpose of gathering evidence against them in order to prosecute them for the very crimes that the search reveals." *Id.* Using the *Knights* test, the Court concluded that there is

> no reason why a search cannot be reasonable absent an individualized suspicion in the limited circumstances of this case, where the individual's expectation of privacy was even more limited than in *Knights*, the government intrusion, a buccal swab, was minimal at most and the government objective is as strong as in *Knights*.

Raines, 383 Md. at 17, 857 A.2d at 29 (plurality opinion). A government interest highlighted in *Raines* was to identify recidivists, persons involved with crimes, and unidentified bodies. 383 Md. at 21, 857 A.2d at 31 (plurality opinion).

Judge Raker's concurring opinion disagreed with the plurality opinion as to its conclusion of the severely limited expectation of privacy a convicted felon has in

his/her bodily fluids, but upheld the statute based on her acceptance of the analogy between fingerprints and DNA profiles as providing purely identifying information. *Raines*, 383 Md. at 44-45, 857 A.2d at 45 (nodding to the State's assertion that a DNA profile is just a series of numbers, similar to a social security number). In a separate concurring opinion, Judge Wilner criticized the plurality opinion's characterization of the State's interest in the DNA as simply identification, calling it "misleading even to suggest, much less hold, that this program is not designed for the predominant purpose of providing evidence of criminality." *Raines*, 383 Md. at 51, 857 A.2d at 49. He conceded, however, that convicted criminals have a high rate of recidivism and that DNA's reliability serves the government's interest in identification in the same way as fingerprints and photographs do. *Raines*, 383 Md. at 51-52, 857 A.2d at 49 (Wilner, J., concurring).

In our next relevant case to consider the Fourth Amendment implications of the Act, *Williamson v. State*, 413 Md. 521, 526, 993 A.2d 626, 629 (2010), a woman told police in 1994 that Williamson had raped her. A sexual assault examination was performed and vaginal swab collected (but no DNA was analyzed). *Id.* Williamson entered ultimately an Alford plea to battery in the case. *Id.* In 2002, a different woman told police that an unknown assailant raped her, a sexual assault forensic examination was performed, and a vaginal swab was collected. *Williamson*, 413 Md. at 526, 993 A.2d at 629. The DNA was analyzed and uploaded to the database, but there were no DNA profile matches. *Williamson*, 413 Md. at 526-27, 993

A.2d at 629-30. In 2005, Anne Arundel County Police received a financial grant to be used to solve cold cases. *Williamson*, 413 Md. at 527, 993 A.2d at 630. Pursuant to the grant, the police analyzed the vaginal swab from the 1994 alleged rape, which resulted in a match to the DNA profile in the 2002 rape. *Id.* Police suspected Williamson of both rapes. *Id.* After being arrested on an unrelated open warrant and while he was held in a police interrogation room, Williamson was given a McDonald's meal[18] by the police. *Id.* He drank from the drink cup and left the debris behind when he was taken from the room. *Id.* The police recovered the discarded cup and swabbed it for DNA. *Id.* The DNA thus obtained was analyzed and the results uploaded to the database, yielding a match to the specimens obtained from the 1994 and 2002 rapes. *Williamson*, 413 Md. at 528, 993 A.2d at 630. Williamson was indicted by a grand jury for charges stemming from the 2002 rape. *Williamson*, 413 Md. at 528, 993 A.2d at 631.

Applying the two-part test from *Katz*, the Court concluded that Williamson abandoned the McDonald's cup in the police station and, therefore, could expect reasonably that the police might collect and investigate the cup. *Williamson*, 413 Md. at 536-37, 993 A.2d at 635. Williamson argued that, even if the cup was

---

[18] The record does not specify whether Williamson was provided with a McDonald's Extra Value Meal. If that was what he received, it appears that the State received the "extra value," not Williamson.

seized lawfully, the analysis of his DNA sample constituted a second and subsequent search and seizure for the purposes of the Fourth Amendment, which required a warrant. *Williamson*, 413 Md. at 539, 993 A.2d at 637. In dicta, the Court suggested that "[h]ad the police compelled Williamson to give a DNA sample as a pre-trial detainee, Williamson's argument may have had some weight." *Williamson*, 413 Md. at 540, 993 A.2d at 637. Relying on the declaration in *Raines* that DNA profiles produced under the authority of the Maryland DNA Collection Act provide identification of the person only, rather than being concerned with the vast amount of genetic information contained within the actual DNA sample, the Court concluded that, because Williamson abandoned the cup, there was no Fourth Amendment search implicated by the analysis of the DNA sample. *Williamson*, 413 Md. at 547, 993 A.2d at 641 (analogizing the abandoned DNA on the cup to a garbage bag left outside the curtilage of a home).

Most recently, in *Raynor v. State*, 201 Md. App. 209, 29 A.3d 617 (2011), our colleagues on the Court of Special Appeals tackled another facet of analyzing a reasonable expectation of privacy in one's DNA under Fourth Amendment jurisprudence. Appellant Raynor became a suspect in an unsolved rape case and was asked by State Police to come to the local barracks to talk about the investigation. *Raynor*, 201 Md. App. at 214-15, 29 A.3d at 620. The police asked Raynor for a DNA sample; he refused. *Raynor*, 201 Md. App. at 215, 29 A.3d at 621. During the interview, however, Raynor rubbed repeatedly his hands up and down the arm-rests of the chair in which he was seated. *Id.*

After the interview, the police swabbed the arm-rests and obtained a viable DNA sample that, once analyzed, matched the sample taken from a rape kit obtained from the victim. *Raynor*, 201 Md. App. at 216, 29 A.3d at 621. The trial court refused, on Raynor's motion, to suppress the DNA evidence. *Raynor*, 201 Md. App. at 216, 29 A.3d at 621-22. On appeal, the thrust of Raynor's argument (similar to Williamson's, *supra*) was that he had a reasonable expectation of privacy in the DNA within his skin cells, despite the latter having been gathered lawfully by the police from the arm-rests. *Raynor*, 201 Md. App. at 217, 29 A.3d at 622. The Court of Special Appeals, relying principally on the reasoning of Judge Raker's concurring opinion in *Raines*, concluded that "even if appellant could demonstrate a subjective expectation of privacy in his DNA profile, he nonetheless had no objectively reasonable expectation of privacy in it because it was used for identification purposes only." *Raynor*, 201 Md. App. at 222, 29 A.3d at 625. The intermediate appellate court reasoned that collection of the DNA from the chair was analogous to collection of a latent fingerprint and, therefore, was not a constitutionally-protected search. *Id.*

C. The State of Fourth Amendment Challenges to Analogous Federal and other State Statutes

Courts have upheld overwhelmingly against Fourth Amendment challenges federal and state statutes authorizing warrantless, suspicionless DNA collection from convicted criminals, including incarcerated prisoners, parolees, and probationers. Federal and state courts are divided, however, on the

constitutionality of requiring mere arrestees to submit to DNA sample collection. At the heart of this debate (and the present case) is the presumption of innocence cloaking arrestees and whether legitimate government interests outweigh the rights of a person who has not been adjudicated guilty of the charged crime, and is somewhere closer along the continuum to a person who is not charged with a crime than he or she is to someone convicted of a crime.

In *People v. Buza*, 197 Cal. App. 4th 1424, 129 Cal. Rptr. 3d 753, 755 (Cal. Ct. App. 2011), *cert. granted*, 132 Cal. Rptr. 3d 616, 262 P.3d 854 (Cal. 2011), the First Appellate District, Division Two, of the Court of Appeal of California held unconstitutional facially the section of California's Forensic Identification Database and Data Bank Act of 1998 ("California DNA Collection Act") (Cal. Penal Code § 296 (2011)), that authorized the taking of a DNA sample from all adults arrested or charged with a felony.[19] Mark Buza was

---

[19] The California DNA Collection Act, as to its treatment of arrestees, is similar substantially to Maryland's DNA Collection Act. The same 13 loci are analyzed and uploaded to the state DNA database, which is connected to CODIS. No identifying information is included with the DNA profile. There are statutory protections against unauthorized use or disclosure of the database information. The statutes' differ, however, in that California does not require waiting until a scheduled arraignment for analysis of the sample and arrestees must request expungement,

(continued...)

arrested for arson and vandalism and asked to provide a DNA sample, as required by the California Act; he refused. *Id.* Buza was informed that, under the California Act, refusal to provide a DNA sample after arrest was itself a misdemeanor offense. *Buza*, 129 Cal. Rptr. 3d at 756. The State charged Buza, on information, with arson, vandalism, and refusal to provide a DNA sample under the California DNA Collection Act. *Id.* Buza moved for an acquittal on the charge of failure to provide a DNA sample, contending that being charged with a felony was not a sufficient basis for the state to require a DNA sample. *Id.* His motion was denied, yet he continued to refuse to provide a DNA sample. *Id.* Buza was convicted on all charges. *Id.* The court ordered law enforcement to use "reasonable force" to extract the DNA sample. *Id.* Buza was sentenced to 16 months, including six months for his refusal to provide DNA. *Id.* He was informed his DNA would be uploaded into the database. *Id.*

Buza appealed his conviction for failure to provide a DNA sample, arguing that, as an arrestee, he was entitled to the presumption of innocence and had the right, under the Fourth Amendment, to be free of unreasonable searches and seizures. *Buza*, 129 Cal. Rptr. 3d at 755. In analyzing Buza's facial attack on the constitutionality of the statute authorizing DNA collection from arrestees, the court summarized

---

[19](...continued)
rather than the automatic procedures in the Maryland DNA Collection Act.

relevant cases upholding DNA collection of convicted offenders, highlighting the narrow grounds on which these cases were decided or the divided views expressed by the deciding courts. *Buza*, 129 Cal. Rptr. 3d at 762 (noting the "limited nature" of the holding in *United States v. Kincade*, 379 F.3d 813, 836 (9th Cir. 2004), applying only to "lawfully adjudicated criminals whose proven conduct substantially heightens the government's interest in monitoring them," and the Ninth Circuit in *United States v. Kriesel*, 508 F.3d 941, 948-49 (9th Cir. 2007), because its holding did not apply to arrestees).

The *Buza* court looked also to opinions that evaluated DNA collection from arrestees or pre-trial detainees. 129 Cal. Rptr. 3d at 763. In *Friedman v. Boucher*, 580 F.3d 847, 851 (9th Cir. 2009), a Montana law enforcement officer requested a DNA sample (under a Montana statute authorizing collection from convicted felons) from a pre-trial detainee who had been convicted, sentenced, and served time to completion in Nevada previously for an unrelated crime.[20] The *Friedman* court concluded that, despite the state's assertions that pre-trial detainees have a limited expectation of privacy and that the government has a legitimate interest in collecting DNA samples for its database, forcible extraction of DNA, without a warrant and in the absence of individualized suspicion,

---

[20] Friedman was convicted and served his sentence in Nevada and was not under parole or probationary supervision by Montana. *Friedman v. Boucher*, 580 F.3d 847, 854 (9th Cir. 2009).

or for the purposes of solving unsolved crimes, was unconstitutional as applied to Boucher. 580 F.3d at 851, 856. The court noted that government interests that would offset the expectation of privacy in certain circumstances (prison security or supervision and integration of parolees) are not present with pre-trial detainees and, additionally, Montana's constitution provides greater privacy protections than the Fourth Amendment. *Friedman*, 580 F.3d at 858 (citing government interests in *Samson*, 547 U.S. at 856, 126 S. Ct. at 2202, 165 L. Ed. 2d at 262). In response to the government's argument that the search was reasonable because of the reduced privacy rights of pre-trial detainees, the court responded by noting that the Supreme Court has not allowed suspicionless searches of pre-trial detainees for reasons other than prison security. *Friedman*, 580 F.3d at 856-57. Quoting from *Schmerber v. California*, 384 U.S. 757, 770, 86 S. Ct. 1826, 1835, 16 L. Ed. 2d 908, 919 (1966), the court emphasized "[t]he importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great." *Friedman*, 580 F.3d at 857. The *Friedman* court distinguished the holdings in *Kincade* and *Kriesel*, discussed *supra*, because those cases addressed convicted criminals and Friedman was only a pre-trial detainee for the purposes of the Montana statute. *Id*.

In *United States v. Pool*, 621 F.3d 1213 (9th Cir. 2010), a divided panel of the Ninth Circuit affirmed the holding of a federal magistrate judge who found constitutional, against an as-applied challenge, provisions of the Bail Reform Act of 1966 (18 U.S.C. §

3142(b), (c)(1)(A) (2009)), and the DNA Fingerprint Act of 2005 (42 U.S.C. § 14135a (2009)) requiring Pool, as an arrestee, to provide a DNA sample as a condition of his pre-trial release.[21, 22] The majority opinion in *Pool*, adopting the magistrate judge's approach, applied the totality of the circumstances test and concluded that a "judicial or grand jury finding of probable cause" is a "watershed event" that tips the scales in favor of "the government's interest in definitively determining the defendant's identity," at the expense of a "defendant's privacy interest in giving a DNA sample as a condition

---

[21] The Ninth Circuit granted a rehearing en banc and directed that the three judge panel opinion, *United States v. Pool*, 621 F.3d 1213 (9th Cir. 2010), not be used as precedent by any court. *United States v. Pool*, 646 F.3d 659 (9th Cir. 2011). While the en banc rehearing was pending, Pool pleaded guilty, and the Ninth Circuit vacated the three judge panel opinion and dismissed the appeal as moot. *United States v. Pool*, 659 F.3d 761 (9th Cir. 2011).

[22] The Bail Reform Act of 1966 allows a judge to order that an individual who has been charged, but is released on his or her recognizance or an unsecured appearance bond while awaiting trial, "cooperate in the collection of a DNA sample" if he or she is arrested or facing federal charges. 18 U.S.C. § 3142(b) (2009). The DNA Fingerprint Act of 2005 provided the authority to collect DNA samples from persons "who are arrested, facing charges, or convicted from non-United States persons who are detained under the authority of the United States." 42 U.S.C. § 14135a(a)(1)(A) (2009).

of pre-trial release . . . ." 621 F.3d at 1219, 1226. The magistrate likened the DNA sample requirement to other conditions of pre-trial release that limit liberty, including electronic monitoring and mandatory curfews. *Pool*, 621 F.3d at 1217. The appeals-court-panel majority concluded that Pool had not shown any greater privacy interest in his DNA than had Kincade (a convict), *supra*, because the DNA statute required that only identifying numbers be used in the reporting system. *Pool*, 621 F.3d at 1222. The competing government interests included allowing "the government to ensure that the defendant did not commit some other crime[;] . . . discourage[d] a defendant from violating any condition of his or her pretrial release"; and served the same purpose of identifying potentially dangerous individuals to the public, whether arrestees or convicts. *Pool*, 621 F.3d at 1223.

In dissent, Judge Schroder countered that *United States v. Brown*, 563 F.3d 410, 414-15 (9th Cir. 2009), required that the government bear the burden of showing that searches and seizures are reasonable under a Fourth Amendment exception. *Pool*, 621 F.3d at 1237. Under its application of the balancing test, the dissent concluded that Pool's expectation of privacy had not been reduced by a conviction and, therefore, the government's asserted interest in *Pool* was obliged, in order to overcome Pool's expectation, to be even more significant than those recognized with regard to convicts; the government may not rely on a "generalized interest in preventing the commission of crimes by pretrial defendants." *Pool*, 621 F.3d at 1237-38. The dissent remarked also on the difference

between the DNA profile and the DNA sample; although the former contains numeric identifiers only, the latter contains the entire genetic makeup of an individual. *Id.*

In *United States v. Mitchell*, 652 F.3d 387 (3rd Cir. 2011), *cer't denied*, ___ U.S. ___, ___ S. Ct. ___, 182 L. Ed. 2d 558 (2012), a divided Third Circuit, sitting en banc, reached a similar conclusion as did the majority in *Pool, supra*.[23] Mitchell was indicted for one count of attempted possession with intent to distribute cocaine. *Mitchell*, 652 F.3d at 398. While in pre-trial detention, he refused to give a DNA sample demanded pursuant to the federal DNA Collection Act (42 U.S.C. § 14135a(a)(1)(A) (2011)). *Id.* His refusal was upheld by the federal district court. *Mitchell*, 652 F.3d at 398. On appeal, the Third Circuit reversed. *Mitchell*, 652 F.3d at 402. Mitchell argued that collection of DNA samples from arrestees and pre-trial detainees under the DNA Collection Act constituted an unreasonable search and seizure, violating the Fourth Amendment. *Id.* The parties disagreed whether Mitchell had mounted a facial or as-applied constitutional challenge in the trial court, so the appellate court, following the guidance in *United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010), considered both types of challenge.

---

[23] Mitchell filed a petition for writ of certiorari on 22 November 2011(application number 11A384) in the United States Supreme Court. The petition was denied on 19 March 2012.

Mitchell, 652 F.3d at 405.[24] The court, following the direction in *Connection Distribution Co. v. Holder*, 557 F.3d 321, 327-28 (6th Cir. 2009), that "[t]he usual judicial practice is to address an as-applied challenge before a facial challenge," considered first the constitutionality of the statute as applied to the facts in Mitchell's case. *Mitchell*, 652 F.3d at 405 (internal quotation omitted) (internal citation omitted).

Using the *Knights* totality of the circumstances test, the *Mitchell* court majority concluded that there are two separate searches when DNA is collected. *Mitchell*, 652 F.3d at 406. The first is the physical collection, usually via a buccal swab or a blood draw. *Id.* The court concluded that the physical intrusion was quick and painless (relatively so) and, therefore, a minimal invasion, and did not weigh in the defendant's favor. *Mitchell*, 652 F.3d at 407 (citing *Skinner*, 489 U.S. at 625, 109 S. Ct. at 1417, 103 L. Ed. 2d at 665; *Nicholas v. Goord*, 430 F.3d 652, 656 n.5 (2d Cir. 2005)). The second search is the processing of the DNA sample and creation of the DNA profile. *Mitchell*, 652 F.3d at 407. Mitchell's challenge pointed to the

---

[24] In *United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010), there was ambiguity as to whether Marcavage advanced an as-applied or facial constitutional attack. The court concluded that Marcavage's "hybrid" approach to advancing both attacks was permissible and proceeded to analyze the facial challenge first because the burden was "significantly heavier" and could be decided (against him) quickly. *Id.*

vast amount of personal data contained within a DNA sample and the potential for misuse of the data. *Id.* The court, however, was not persuaded by Mitchell's argument, relying on the numerous statutory protections of the data and the "junk" nature of the 13 loci used to create the profile. *Mitchell*, 652 F.3d at 408. The court embraced an analogy between fingerprints and DNA profiles, treating both as routine booking procedures, and concluded that pre-trial detainees have a diminished privacy interest relative to means to ascertain and confirm their identities. *Mitchell*, 652 F.3d at 411 ("[I]t is 'elementary' that blanket fingerprinting of individuals who have been lawfully arrested or charged with a crime does not run afoul of the Fourth Amendment.") (quoting *Smith v. United States*, 324 F.2d 879, 882 (D.C. Cir. 1963))).

The court in *Mitchell* conceded that the government's interests in obtaining DNA from an arrestee are not as strong as with convicts, probationers, or parolees. 652 F.3d at 413. Mitchell maintained that the interest in law enforcement is "equally well served by collecting DNA samples post-conviction," however, the court was persuaded by the government's argument that there is a strong interest in identifying arrestees. *Id.* Quoting from *United States v. Sczubelek*, 402 F.3d 175, 185 (3rd Cir. 2005), the *Mitchell* court reiterated that a criminal may take "unusual steps to conceal not only his conduct, but also his identity" by using disguises, changing names, or changing physical features. 652 F.3d at 414. Such attempts by criminals to obfuscate their identities amplify the government's need to use DNA to identify accurately pre-trial detainees or

arrestees, concluded the court. *Id.* The majority, however, made no mention of evidence that Mitchell had attempted to conceal his identity or that the government had any difficulties determining Mitchell's identity without resorting to a DNA profile.

The *Mitchell* majority, quoting from *Haskell v. Brown*, 677 F. Supp. 2d 1187, 1199 (N.D. Cal. 2009), perceived two components to identity: "who that person is (the person's name, date of birth, etc.) and what that person has done (whether the individual has a criminal record, whether he is the same person who committed an as-yet unsolved crime across town, etc.)." *Id.* The court placed great weight on the second component, noting that a person's criminal record has important ramifications for pre-trial release considerations. *Id.* The court conceded, however, that "in comparison to the probationer cases, the interests in supervision and prevention of recidivism are much diminished, if not absent, in the context of arrestees and pretrial detainees." *Mitchell*, 652 F.3d at 415 n.25 (quoting *United States v. Scott*, 450 F.3d 863, 874 (9th Cir. 2006) ("That an individual is charged with a crime cannot, as a constitutional matter give rise to any inference that he is more likely than any other citizen to commit a crime if he is released from custody.")). Concluding that the government's interest in identifying arrestees was sufficient to render the DNA Act constitutional, as applied to Mitchell, the court resolved that Mitchell's facial challenge to the statute failed. *Mitchell*, 652 F.3d at 415-16.

A strongly worded dissent criticized the *Mitchell* majority's conclusions, asserting that it gave "short

shrift" to an arrestee's privacy interest by reducing it only to an interest in identity. 652 F.3d at 416 (Rendell, J., dissenting). Judge Rendell maintained that statutory limitations on the use of DNA profiles, "though not wholly irrelevant, are not panaceas, . . . and cannot offset the severe invasion of privacy that takes place when an arrestee's DNA is seized and searched." *Id.* The dissent described the privacy interest of arrestees, "while diminished in certain, very circumscribed situations, are not so weak as to permit the Government to intrude into their bodies and extract the highly sensitive information coded in their genes." *Mitchell*, 652 F.3d at 421 (Rendell, J., dissenting). Objecting to the majority's characterization of the government interest as simply "identification," Judge Rendell countered that the purpose of collecting arrestee and pre-trial detainee DNA

> is not to "identify" the arrestee in the sense of allowing law enforcement to confirm that the correct person has been arrested or keeping records of who has been in federal custody, but to use those profiles and the information they provide as evidence in the prosecution and to solve additional past and future crimes.

Mitchell, 652 F.3d at 422-23 (Rendell, J., dissenting). Quoting the dissenting opinion in *Kincade*, Judge Rendell argued that "[t]he collection of a DNA sample . . . does not 'identify' an [arrestee or pre-trial detainee] any more than a search of his home does — it merely collects more and more information about that [arrestee or pre-trial detainee] that can be used to

investigate unsolved past or future crimes." *Mitchell*, 652 F.3d at 423 (Rendell, J., dissenting) (quoting *Kincade*, 379 F.3d at 857 n.16 (Reinhardt, J., dissenting)). Relying on the presence of the expungement provision in the statute, the dissent bolstered its argument against a simplistic "identification" purpose being the sole government interest, stating that

> [i]f the Government's real interest were in maintaining records of arrestees' identifies, there would be no need to expunge those records upon an acquittal or failure to file charges against the arrestee. Indeed, this statutory provision serves as an admission that the fact of *conviction*, not of mere arrest, justifies a finding that an individual has a diminished expectation of privacy in his DNA.

Mitchell, 652 F.3d at 423 (Rendell, J., dissenting). Attacking further the purported "identification only" usage of the DNA sample offered-up by the government, Judge Rendell likened the process to "the Government seiz[ing] personal medical information about you but . . . only us[ing] the subset of that information that serves to identify you." *Mitchell*, 652 F.3d at 424 (Rendell, J., dissenting).

The dissent dissected also the analogy between fingerprints and DNA, quoting from *Sczubelek*, 402 F.3d at 197-98, which opined that collecting DNA "requires production of evidence below the body surface which is not subject to public view," as opposed to fingerprints which are accessible readily on the

surface of the skin. *Mitchell*, 652 F.3d at 424-25 (Rendell, J., dissenting) (internal citation omitted). Judge Rendell rejected the reasoning of the majority in *Pool*, that probable cause for a particular crime is a "watershed event," observing that *Pool* "never explains why a finding of probable cause in connection with a particular crime justifies the collection of DNA profiles for use in connection with other crimes for which, by definition, there has been no finding of probable cause or, indeed, any suspicion at all." *Mitchell*, 652 F.3d at 427 (Rendell, J., dissenting). Finally, the dissent attacked the foundation of the majority's Fourth Amendment analysis by noting that there are clearly defined exceptions to the general prohibition on warrantless searches, including reasonable suspicion of imminent danger and prison and jail searches. *Mitchell*, 652 F.3d at 428 (Rendell, J., dissenting) (citing *Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883, 20 L. Ed. 2d 889, 909 (1968); *Florence v. Burlington Cnty.*, 621 F.3d 296, 307 (3d Cir. 2010)); *see generally Kincade*, 379 F.3d at 822-24). Concluding that none of those exceptions were applicable and that the majority opinion should not have accepted non-specific, broad government goals of fighting crime to justify a Fourth Amendment violation under an analysis that seemed more like a First Amendment "rational basis" review, the dissent advocated the more stringent approach required for Fourth Amendment analyses. *Mitchell*, 652 F.3d at 428 (Rendell, J., dissenting).

The final major case considered by the *Buza* court was *Haskell*, 677 F. Supp. 2d at 1187, which denied a preliminary injunction to enjoin collection of a DNA

sample pursuant to the California DNA Collection Act. *Buza*, 129 Cal. Rptr. 3d at 753. Plaintiffs in *Haskell* mounted a facial challenge to the California Act under the Fourth Amendment. 677 F. Supp. 2d at 1192. The *Haskell* court, tracking the reasoning generally of *Kincade* and *Kriesel*, concluded that, although arrestees have a greater privacy interest than prisoners, that interest is less than that of a member of the general population; therefore, arrestees are subject to a broad range of restrictions. *Haskell*, 677 F. Supp. 2d at 1196. The court adopted the fingerprint/DNA analogy accepted by other courts and concluded that an arrestee's privacy interest "is not weighty." *Haskell*, 677 F. Supp. 2d at 1198. Following the reasoning of *Mitchell*, the *Haskell* court concluded that identification has two components and that the government has a legitimate interest in not only the name and date of birth of an arrestee, but also his or her criminal history (even criminal acts as yet undiscovered). *Haskell*, 677 F. Supp. 2d at 1199. The court was concerned that "[a]n individual might wear gloves at some point, thwarting fingerprint identification, or wear a mask, thwarting the use of photographs," and, therefore, DNA sampling was a more accurate and necessary form of identification. *Id.*

In its sifting of the relevant cases, the *Buza* court rejected the DNA/fingerprint analogy relied upon in *Mitchell*, *Pool*, and *Haskell*. *Buza*, 129 Cal. Rptr. 3d at 768. Similar to the dissent in *Mitchell*, *Buza* focused on whether the use of the DNA profile could overcome the "full extent of the search that has taken place." *Buza*, 129 Cal. Rptr. 3d at 768 (citing *Mitchell*, 652 F.3d at 416 (Rendell, J., dissenting)). The search

referred to was the extraction of the entire human genome, which is necessary to develop the DNA profile uploaded to CODIS. *Buza*, 129 Cal. Rptr. 3d at 769. The court, although acknowledging that the so-called "junk DNA" is not thought currently to code for genetic information, predicted advances in scientific technology which, along with the perpetual preservation of the DNA sample (not just the DNA profile), creates privacy concerns. *Id.* Noting that requiring fingerprinting after arrest has never undergone Fourth Amendment scrutiny, the *Buza* court rejected the notion that simply because fingerprinting is commonplace that DNA should take its place readily as a routine booking procedure, without additional scrutiny.[25] *Id.*

As to the governmental interest in "identification" touted by the *Haskell* court, the court in *Buza* countered that the purpose of DNA sampling was investigation actually. 129 Cal. Rptr. 3d at 770-71. Fingerprints taken for identification "verify that the person who is fingerprinted is really who he says he is," while those taken for investigatory purposes are taken "to connect [the person fingerprinted] to a crime

---

[25] The court noted with some concern the relatively facile interpretive evolution of the DNA Act occurring between *Kincade* (certain convicted felony offenders), *Kriesel* (all convicted felony offenders), *Pool* (individuals charged with felony offenses), and then *Haskell* (arrestees who have not had a judicial determination of probable cause). *People v. Buza*, 129 Cal. Rptr. 3d 753, 770 (Cal. Ct. App. 2011).

with which he was not already connected." *Buza*, 129 Cal. Rptr. 3d at 770 (quoting *United States v. Garcia-Beltran*, 389 F.3d 864, 864 (9th Cir. 2004)). Fingerprints obtained for identification are admissible in court, while those obtained for investigatory purposes must be suppressed if their purpose was to "connect [the arrestee] to alleged criminal activity." *Id.* (quoting *Garcia-Beltran*, 389 F.3d at 865; citing *Hayes v. Florida*, 470 U.S. 811, 105 S. Ct. 163, 84 L. Ed. 2d 705 (1985); *Davis v. Mississippi*, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969)). Addressing the far-reaching, two-component definition of "identification" advanced in *Haskell*, the *Buza* court reasoned that the very nature of the second component (the criminal history of, or as-yet-unsolved crimes committed by, that person) implies an "investigatory" purpose. 129 Cal. Rptr. 3d at 753. The realities of the DNA processing system mean that identification does not happen immediately (noting an average processing time of 31 days) and the DNA database does not contain identification information. *Buza*, 129 Cal. Rptr. 3d at 772-73. Collection and processing of DNA samples in California requires that fingerprints be used alongside the DNA sample to "identify the subject" specifically, lending further support to the conclusion that the purpose of the collection is not identification. *Buza*, 129 Cal. Rptr. 3d at 773 (quoting *FAQs: Collection Mechanics, question 1.1*, http://ag.ca/gov/bfs/content/faqphp#mecahnics (last visited 4 Aug. 2011)). The identity-obscuring initiatives of concern in *Haskell* and the comment in *Kincade* that there is no way to avoid leaving DNA at the scene of the crime were deemed by the *Buza* court as weighing heavily in favor of concluding that DNA

sampling is actually for investigatory purposes, as these relate directly to crime scene investigation. *Buza*, 129 Cal. Rptr. 3d at 773-74 (noting that an "arrestee cannot mask his or her identity by wearing gloves while being fingerprinted" or by wearing a mask while being photographed during routine booking procedures). The court concluded, from the text of the California DNA Collection Act, that the purpose of the Act was "unquestionably consonant" with the second component of identification, which is an investigatory process essentially. *Buza*, 129 Cal. Rptr. 3d at 774. The California Act "involves a programmatic warrantless search of all arrestees' DNA, without individualized suspicions and prior to any judicial determination of probable cause, much less guilt." *Buza*, 129 Cal. Rptr. 3d at 780. Because the purpose is "to determine whether the arrestee can be connected to a past unsolved crime and to create a databank through which he or she may now or in the future be connected to a new offense," the California DNA Collection Act did not meet any of the special needs exceptions and a generalized interest in crime fighting did not outweigh the privacy interests of mere arrestees. *Id.*

The Court of Appeals of Minnesota weighed-in on the topic, in a certified question context, finding facially unconstitutional a Minnesota statute that required charged defendants to provide a DNA sample, after a judicial finding of probable cause, but prior to a conviction. *In re Welfare of C.T.L.*, 722 N.W.2d 484, 486 (Minn. Ct. App. 2006). In *C.T.L.*, a juvenile was charged with fifth-degree assault and aiding and abetting a first-degree aggravated robbery. *Id.* The

State of Minnesota ordered the juvenile to provide a biological specimen for DNA analysis pursuant to Minn. Stat. § 299C105 (Supp. 2005).[26] *Id.* The juvenile moved for an order certifying the question of the statute's facial constitutionality.[27] *Id.* The court began its analysis with the premise that outside of "a few specifically established and well-delineated exceptions," searches conducted "outside the judicial process, without prior approval by a judge or magistrate[,] are *per se* unreasonable." *C.T.L.*, 722 N.W. 2d at 488 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 454-45, 91 S. Ct. 2022, 2032, 29 L. Ed. 2d 564, 576 (1971)). Drawing on the holding of

---

[26] The Minnesota DNA statute provides for destruction of the DNA sample if the person is found not guilty or the charges against a person are later dismissed. *In re Welfare of C.T.L.*, 722 N.W.2d 484 (Minn. Ct. App. 2006).

[27] The certified question was

> Do the portions of Minn. Stat. § 299C.105, subd. 1(a)(1) and (3) (Supp. 2005), that direct law-enforcement personnel to take a biological specimen from a person who has been charged with an offense, but not convicted, violate the Fourth Amendment to the United States Constitution and Article I, Section 10, of the Minnesota Constitution?

C.T.L., 722 N.W. 2d at 486-87.

Schmerber,[28] the Minnesota court concluded that "establishing probable cause to arrest a person is not, by itself, sufficient to permit a biological specimen to be taken from the person without first obtaining a search warrant." *C.T.L.*, 722 N.W.2d at 490 (noting the holding in *Schmerber*, 384 U.S. at 769-70, 86 S. Ct. at 1835, 16 L. Ed. 2d at 919, that "[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained").

The State in *C.T.L.* advanced a *Pool* "watershed event" argument as regards the initial finding of probable cause, to which the Minnesota court responded that the "argument fails to recognize . . . that probable cause to support a criminal charge is not the same thing as probable cause to issue a search warrant." 722 N.W.2d at 490. The court explained

---

[28] *Schmerber* involved a defendant who was arrested for drunk driving based on the probable cause of the smell of alcohol and his blood-shot, watery, and glassy eyes. *Schmerber v. California*, 384 U.S. 757, 769, 86 S. Ct. 1826, 1835, 16 L. Ed. 2d 908, 919 (1966). The Supreme Court upheld the drawing of blood from Schmerber on the narrow special circumstances that waiting for a search warrant would have allowed the alcohol in his system to disappear, thus, an exigent circumstance was pivotal to the Court's reasoning. *Schmerber*, 384 U.S. at 770, 86 S. Ct. at 1835, 16 L. Ed. 2d at 919. Outside of this "emergency" situation, a warrant to invade the body should be obtained "by a neutral and detached magistrate." *Id.*

that "probable cause [for charging purposes] . . . exists when the evidence worthy of consideration brings the charge against the prisoner within reasonable probability." *Id.* (internal citations omitted). On the other hand, probable cause to support a search warrant is found when there is "a fair probability that contraband evidence of a crime will be found in a particular place." *Id.* (internal citation omitted). Conflation of the two standards of probable cause, the *C.T.L.* court concluded, dispenses with the Fourth Amendment requirement that, in order to conduct a search, "law-enforcement personnel must obtain a warrant based on a neutral and detached magistrate's determination that there is a fair probability that the search will produce contraband or evidence of a crime." 722 N.W.2d at 491. Relying on the expungement provision in the Minnesota statute (which allowed those found not guilty ultimately or had charges dropped to have their DNA samples destroyed), the court reasoned that those persons found not guilty had an expectation of privacy greater than the State's need for DNA and, therefore, this interest should be applied reasonably to all persons charged, but not convicted yet. *C.T.L.*, 722 N.W.2d at 491-92. Finally, the *C.T.L.* court concluded that the privacy interest of a person who is charged, but not convicted, is not outweighed by the state's interest in collecting DNA samples. 722 N.W.2d at 492.

In *United States v. Purdy*, No. 8:05CR204, 2005 U.S. Dist. LEXIS 40433, *1 (D. Neb. 2005), a federal district court, against the recommendation of its magistrate judge, granted a defendant's motion to suppress DNA evidence collected under the Nebraska

Identifying Personal Characteristics Act ("Nebraska Act"), which allowed law enforcement, without a court order, to collect DNA samples from arrestees.[29] Purdy was arrested on an outstanding warrant and, at arrest, found to possess a firearm. *Purdy*, 2005 U.S. Dist. LEXIS 40433, at *3. After his arrest, correctional officers collected forcefully DNA samples, causing physical injuries to Purdy that required medical treatment. *Id.* Conceding that the Fourth Amendment does not protect a "characteristic that a person knowingly exposes to the public," like fingerprints or visual likeness, the court distinguished DNA as not exposed to the public and able to reveal medical facts for which individuals have a reasonable expectation of privacy. *Purdy*, 2005 U.S. Dist. LEXIS 40433, at *11. Beginning with the *Katz* premise that a search without a warrant is per se unreasonable, the court concluded that none of the "special needs" exceptions were applicable and used the totality of the circumstances balancing test to evaluate Purdy's challenge. *Purdy*, 2005 U.S. Dist. LEXIS 40433, at *13-15. The Nebraska Act did not provide a

---

[29] The Nebraska Act allowed collection of "physical evidence from individuals to aid them in identifying the perpetrators of criminal offenses," including "fingerprints, palm prints, footprints, measurements, handwriting exemplars, lineups, hand printing, voice samples, blood samples, urine samples, saliva samples, hair samples, comparative personal appearance, and photographs." *United States v. Purdy*, No. 8:05CR204, 2005 U.S. Dist. LEXIS 40433, *3-4 (D. Neb. 2005).

constitutional basis for the search of Purdy because the statute would allow warrantless DNA sampling of anyone arrested, "without the showing of any nexus between the alleged crime and the information that a DNA test would reveal." *Purdy*, 2005 U.S. Dist. LEXIS 40433, at *21-22. Comparing the expectation of privacy and the government interest in convicts, parolees, and probationers to that of arrestees, the court resolved that an arrestee's expectation of privacy outweighs the government desire for warrantless searches. *Purdy*, 2005 U.S. Dist. LEXIS 40433, at *20-21. Because probable cause for arrest is not the same as required for a search, "[a] person arrested, but not convicted, for a certain crime cannot be forced to provide DNA "identification" evidence without a showing that such evidence would identify him as the perpetrator of the crime." *Purdy*, 2005 U.S. Dist. LEXIS 40433, at *22. The court noted also that its holding did not prevent all arrestees from being subjected to DNA sampling; rather, law enforcement officers would need to obtain a search warrant from a "neutral and detached judicial officer." *Purdy*, 2005 U.S. Dist. LEXIS 40433, at *23.

A fractured, three-judge panel of the Arizona intermediate appellate court upheld an Arizona statute allowing a judge to condition pre-trial release upon collection of a DNA sample. *Mario W. v. Kaipio*, 265 P.3d 389 (Ariz. Ct. App. 2011). Five juveniles were charged[30] and an "advisory" court concluded there was

---

[30] Two additional juveniles were arrested, but (continued...)

probable cause for bringing the charges. *Mario W.*, 256 P.3d at 392. Pre-trial release was conditioned on the giving of DNA samples. *Mario W.*, 256 P.3d at 395. The juveniles contended that the Arizona statute violated the United States and Arizona constitutional protections against unreasonable searches and seizures and their rights to privacy. *Id.* Using the totality of the circumstances test, the Court of Appeals of Arizona, Division One, weighed the following factors in balancing the juveniles' privacy rights against the government interest:

> whether there was a judicial finding of probable cause that the juvenile committed the charged offense, the level of intrusion in relation to the other pre-adjudicative procedures, the degree and nature of physical intrusion required by the test, statutes restricting the use of test results, and any evidence in the record regarding improper uses of the results.

Mario W., 265 P.3d at 396. Agreeing with the conclusion in *Pool*, that a finding of probable cause is a "watershed event," the court determined that the five juveniles were distinguishable from the general public

---

[30](...continued)
there was no judicial finding of probable cause as to them. *Mario W. v. Kaipio*, 265 P.3d 389, 392 (Ariz. Ct. App. 2011). Therefore, the court concluded the pre-trial condition of DNA collection was unconstitutional as applied to the facts of their cases. *Id.*

in such a way that permitted an exception to the Fourth Amendment's prohibition against warrantless searches. *Id.* Other statutory restrictions placed on pre-trial detainees, including GPS tracking, supported the court's conclusion that the juveniles had a reduced expectation of privacy. *Mario W.*, 265 P.3d at 397 (citing Ariz. R. P. Juv. Ct. 23(E)). The government interest served was an "enhanced interest in crime prevention and deterrence," based on the post-arrest finding of probable cause. *Mario W.*, 265 P.3d at 397. The court noted also that the level of physical intrusion of a buccal swab was minimal. *Id.* The government had a strong interest in determining accurately the juvenile's past criminal history in order to set the proper pre-trial release conditions. *Id.* Moreover, taking an arrestee's DNA sample aids the government in solving crimes and expands the DNA database. *Mario W.*, 265 P.3d at 398. The court relied also upon the purpose of identification, agreeing with Mitchell that arrestees do not have a legitimate expectation of privacy in their identity. *Mario W.*, 265 P.3d at 399. A concurring judge wrote separately to advance the fingerprint-to-DNA analogy as the basis for upholding the statute. *Mario W.*, 265 P.3d at 401 (Orozco, J., concurring).

The third judge, in a dissenting opinion, rejected the analogy of DNA-to-fingerprints and, focusing on the arrestees' presumption of innocence, concluded that the State failed to meet its burden to provide justification for abrogating the juveniles' expectation of privacy. *Mario W.*, 265 P.3d at 404 (Norris, J., dissenting). The dissent criticized the majority for misapplying the totality of the circumstances test

when it concluded that the juveniles had "little if any expectation of privacy in their DNA because they have been arrested and a court has found probable cause to hold them for trial." *Mario W.*, 265 P.3d at 405 (Norris, J., dissenting). Rather, argued the dissent, under Supreme Court jurisprudence, the *conviction* is what alters meaningfully the expectation of privacy, not the mere charging. *Mario W.*, 265 P.3d at 405 (Norris, J., dissenting) (citing *Knights*, 534 U.S. at 118, 122 S. Ct. at 591, 151 L. Ed. 2d at 504) (emphasis added). Criticizing also the majority's likening of DNA sampling to other pre-trial release conditions, Judge Norris maintained, as the better reasoned approach, that DNA sampling under prevailing collection techniques is distinguishable because it is a physical intrusion into the body and the juveniles' privacy was further invaded when the DNA sample is analyzed and the profile extracted. *Mario W.*, 265 P.3d at 406 (Norris, J., dissenting).

Rejecting the fingerprint/DNA analogy, Judge Norris noted that a "fingerprint is an impression left by the depositing of oil upon contact between a surface and the fission ridges of the fingers," while DNA "stores massive amounts of personal, private data about an individual." *Mario W.*, 265 P.3d at 407 (Norris, J., dissenting) (quoting *Mitchell*, 365 F.3d at 221; *Kincade*, 379 F.2d at 842 n.3 (Gould, J. concurring)) (internal quotations omitted). The dissent took pains also to protest subsuming DNA sampling into "routine booking practices," countering that fingerprinting became routine prior to the evolution of modern "reasonable expectation of privacy" jurisprudence and "[t]hat today we accept

fingerprinting as a routine practice without Fourth Amendment implications does not mean we must accept DNA sampling as being the same." *Mario W.*, 265 P.3d at 407-08 (Norris, J., dissenting).

Finally, Judge Norris criticized the majority's characterization of the statute's purpose as identification only, pointing out that, if that were the case, expungement upon the dismissal of charges would not be necessary. *Mario W.*, 265 P.3d at 408 (Norris, J., dissenting). Noting that the State failed to produce any evidence that there was any difficulty in obtaining accurate identification of any of the juveniles, which might require another method of identification, the dissent argued that "DNA itself provides no identifying information; a DNA sample is only useful when it can be compared to a prior DNA sample obtained from the same person . . . [i]f the arrestee's DNA is not in a DNA database, there can be no comparison and thus no verification of identity." *Id.* The dissent closed with its concern that the majority opinion will "contribute to the downward ratchet of privacy expectations," and that "[a] highly expansive opinion [authorizing a warrantless search], one that draws no hard lines and revels in the boon that new technology will provide to law enforcement, is an engraved invitation to future expansion." *Mario W.*, 265 P.3d at 409 (Norris, J., dissenting) (quoting *Scott*, 450 F.3d at 867; *Kincade*, 379 F.3d at 873 (Kozinski, C.J., dissenting)).

We conclude our survey of relevant opinions with *Anderson v. Commonwealth*, 274 Va. 469, 650 S.E.2d 702, 703 (Va. 2007). The Supreme Court of Virginia

upheld, against an as-applied Fourth Amendment challenge, a Virginia statute that authorized DNA collection from individuals upon arrest. *Anderson*, 650 S.E.2d at 703. In 2003, Anderson was arrested for rape and sodomy and his DNA sample was collected pursuant to Va. Code Ann. § 19.2-310.2:1 (2007). Anderson, 650 S.E.2d at 704. Anderson's DNA profile was uploaded to the DNA databank, resulting in a match to a forensic sample collected from an unsolved 1991 rape. *Id.* Based on the database "hit," detectives obtained a search warrant for an additional DNA buccal swab, the analysis of which provided the primary evidence at Anderson's trial for the 1991 rape as well as the 2003 crimes. *Id.* His motion to suppress the DNA evidence was denied. *Id.* He was convicted of rape, robbery, and sodomy, and sentenced to two life terms, plus ten years. *Id.*

The Virginia Supreme Court concluded that, although a DNA sample is more revealing, it "is no different in character than acquiring fingerprints upon arrest." *Anderson*, 650 S.E.2d at 705. Adopting the fingerprint-to-DNA analogy advanced in *Nicholas*, *Sczubelek*, and this Court's decision in *Raines*, the Virginia court concluded that DNA collection is acceptable as part of the routine booking process as a way of obtaining an arrestee's identification. *Anderson*, 650 S.E.2d at 705-06. In doing so, the court rejected Anderson's reliance on *City of Indianapolis v. Edmond*, 531 U.S. 32, 47, 121 S. Ct. 447, 457, 148 L. Ed. 2d 333, 347 (2000), standing for the proposition that general crime control purposes can "only be justified by some quantum of individualized suspicion," and *Ferguson v. City of Charleston*, 532 U.S. 67, 121 S.

Ct. 1281, 149 L. Ed. 2d 205 (2001), stating that general law enforcement searches are not exempt from the requirements of probable cause. Anderson, 650 S.E.2d at 706. The Virginia court relied upon the reasoning in *Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992), which considered only application of the Virginia DNA collection statute to convicted felons, but extended the rationale to routine booking procedures, and as such, "no additional finding of individualized suspicion, much less probable cause, must be established before the sample may be obtained." *Anderson*, 650 S.E.2d at 706.

D. The Present Case

We consider first whether King's constitutional challenge to the Maryland DNA Collection Act is as-applied, facially, or both. It is generally preferable for a court to analyze whether a statute is constitutional under the more narrow as-applied standard first, as a matter of judicial efficiency rather than analyzing the broader facial challenge first. *Bd. of Trs. v. Fox*, 492 U.S. 469, 484-85, 109 S. Ct. 3028, 3037, 106 L. Ed. 2d 388, 407 (1989) (noting that "for reasons relating to both the proper functioning of courts and to their efficiency, the lawfulness of the particular application of the law should ordinarily be decided first").[31] It is clear in the present case that

---

[31] Analyzing the as-applied challenge first is, apparently, not a hard and fast rule. *See Marcavage*, *supra*, which analyzed the facial challenge first

(continued...)

King mounts both facial and as-applied Fourth Amendment challenges.

Under Maryland common law, there is a strong presumption that statutes are constitutional. *Koshko v. Haining*, 398 Md. 404, 426, 921 A.2d 171, 183 (2007) (citing, among other cases, *Ayres v. Townsend*, 324 Md. 666, 675, 598 A.2d 470, 475 (1991)). To succeed in an as-applied constitutional challenge, King must show that "under [these] particular circumstances [he was] deprived . . . of a constitutional right." *Mitchell*, 652 F.3d at 406 (quoting *Marcavage*, 609 F.3d at 273).

To evaluate King's as-applied challenge, we analyze the totality of the circumstances, using the *Knights* balancing test that weighs King's expectation of privacy on one hand and the state's interests on the other, keeping in mind that the "touchstone" of Fourth Amendment analysis is reasonableness. Our analysis is influenced also by the precept that the government must overcome a presumption that warrantless, suspicionless searches are per se unreasonable. As other courts have concluded, we look at any DNA collection effort as two discrete and separate searches. The first search is the actual swab of the inside of King's mouth and the second is the analysis of the DNA sample thus obtained, a step required to produce

---

[31](...continued)
because of the "significantly heavier" burden required for facial challenges and anticipating a speedy resolution of this prong of the constitutional challenge. 609 F.3d at 273.

the DNA profile. Although some courts follow *Mitchell* in assessing the buccal swab technique as a quick and painless intrusion, we shall not ignore altogether the gravity of a warrantless search and collection of biological material from a mere arrestee. The State bears the burden of overcoming the arrestee's presumption of innocence and his expectation to be free from biological searches before he is convicted of a qualifying crime. As we held in *Raines*, once a person has been adjudicated lawfully to be a felon, his or her expectation of privacy is "severely reduced" and the State's interest prevails in monitoring, identifying, reintegrating, and preventing recidivism by the felon. Here, however, the expectation of privacy of an arrestee renders the government's purported interests in DNA collection reduced greatly. If application of the balancing test results in a close call when considering convicted felons, as our deeply divided decision in *Raines* suggests, then the balance must tip surely in favor of our closely-held belief in the presumption of innocence here. King's expectation of privacy is greater than that of a convicted felon, parolee, or probationer, and the State's interests are more attenuated reciprocally.

i. King's Expectation of Privacy

King must have a personal, subjective expectation of privacy in order for Fourth Amendment protections to apply. *See Katz*, 389 U.S. at 361, 88 S. Ct. at 516, 19 L. Ed. 2d at 588. As Judge Wilner's concurring opinion in *Raines* noted, DNA samples contain a "massive amount of deeply personal information." 383 Md. at 50, 857 A.3d at 48. The State advances the

syllogism that "all that was obtained through [the] search [of King] was his identity -- in the form of 13 pairs of numbers"; there is no right to anonymity; and, thus, the evidence presented at trial is not suppressible. This argument ignores plainly the implications of the search that took place.

That the Maryland DNA Collection Act restricts the use of the biological material obtained does not change the nature of the search. As Judge Rendell noted in her dissenting opinion in *Mitchell*, upholding the statute simply because of restrictions on use of the material obtained would be analogous to allowing the government to seize private medical records without a warrant, but restrict their use only to the portion of the records that serve to identify the patient. This analogy addresses the State's stance of denying the importance or relevance of the initial physical intrusion and the later processing of King's genetic materials. King, as an arrestee, had an expectation of privacy to be free from warrantless searches of his biological material and all of the information contained within that material.

We do not embrace wholly the analogy between fingerprints and DNA samples advanced in Judge Raker's concurring opinion in *Raines* and by the State in the present case. As aptly noted, fingerprints are a physical set of ridges on the skin of a person's fingers that, when exposed to ink (or other medium) and the resultant imprint placed on paper or electronic records, can determine usually and accurately a person's identity by matching the physical characteristics to a known set of fingerprints. DNA, on the other hand, is

contained within our cells and is collected by swabbing the interior of a cheek (or blood draw or otherwise obtained biological material). While the physical intrusion of a buccal swab is deemed minimal, it remains distinct from a fingerprint. We must consider that "[t]he importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great." *Schmerber*, 384 U.S. at 770, 86 S. Ct. at 1835, 16 L. Ed. 2d at 919.

The information derived from a fingerprint is related only to physical characteristics and can be used to identify a person, but no more. A DNA sample, obtained through a buccal swab, contains within it unarguably much more than a person's identity. Although the Maryland DNA Collection Act restricts the DNA profile to identifying information only, we can not turn a blind eye to the vast genetic treasure map that remains in the DNA sample retained by the State. As Judge Wilner noted in his concurring opinion in *Raines*,

> A person's entire genetic makeup and history is forcibly seized and maintained in a government file, subject only to the law's direction that it not be improperly used and the prospect of a misdemeanor conviction if a custodian *willfully* discloses it in an unauthorized manner. No sanction is provided for if the information is non-willfully disclosed in an unauthorized manner, though the harm is essentially the same.

383 Md. at 50, 857 A.2d at 49. In *Raines*, the State's interest regarding DNA collection from convicted felons overwhelmed these considerations. We do not revisit or question that result. Convicted felons are not at issue here. The greater expectation of privacy of an arrestee and the lesser legitimate interest of the State bring concerns about the privacy of genetic material to a different dynamic in the application of the balancing test. Courts that have upheld DNA collection from arrestees have done so by relying on the fingerprint-to-DNA analogy and a belief that DNA collection has become just another routine booking procedure. While it may be elementary that arrestees undergo photographic and fingerprinting collection, neither of these techniques has undergone definitive Fourth Amendment scrutiny. Even were the fingerprint-to-DNA analogy less tenuous, as described *supra*, we should not be so quick to heap additional exceptions onto a constitutional principle, without a clearer, judicially-proven foundation.

The State underestimates, in seeking to apply conclusively our holding in Raines to the present case, the power of a conviction. Raines's conviction was critical to our analysis there, that convicted felons have a "severely reduced expectation of privacy"; the difference regarding a mere arrestee is critical here. Although arrestees do not have all the expectations of privacy enjoyed by the general public, the presumption of innocence bestows on them greater protections than convicted felons, parolees, or probationers. A judicial determination of criminality, conducted properly, changes drastically an individual's reasonable expectation of privacy. The expungement provisions of

the Act recognize the importance of a conviction in altering the scope and reasonableness of the expectation of privacy. If an individual is not convicted of a qualifying crime or if the original charges are dropped, the DNA sample and DNA profile are destroyed. The General Assembly recognized the full scope of the information collected by DNA sampling and the rights of persons not convicted of qualifying crimes to keep this information private. This right should not be abrogated by the mere charging with a criminal offense: the arrestee's presumption of innocence remains.

The percentage of individuals charged with felonies that are convicted eventually is persuasive. According to data collected by the FBI in 2004, between 16 and 71 percent of individuals charged with a felony are convicted eventually (including guilty pleas), depending on the crime.[32] Bureau of Justice Statistics, U.S. Dept. of Justice, *Sourcebook of Criminal Justice Statistics*, tbl. 5.0002.2004 (Kathleen Maguire ed.), available at http://www.albany.edu/sourcebook/pdf/t500022004.pdf (last visited 20 Apr. 2012). The

---

[32] The rates of conviction per 100 arrests for various crimes were: 16 for motor vehicle thefts, 25 for aggravated assault, 44 for burglary, 46 for robbery, 56 for rape, 68 for murder, and 71 for drug trafficking. Bureau of Justice Statistics, U.S. Dept. of Justice, *Sourcebook of Criminal Justice Statistics*, tbl. 5.0002.2004 (Kathleen Maguire ed.), available at http://www.albany.edu/sourcebook/pdf/t500022004.pdf (last visited 20 Apr. 2012).

reasons for this disparity between arrests and convictions are not always apparent, but they illustrate the potential amount of DNA samples that would be collected and processed without a finding of guilt.

We agree with the Minnesota Court of Appeals in *C.T.L.* that "establishing probable cause to arrest a person is not, by itself, sufficient to permit a biological specimen to be taken from the person without first obtaining a search warrant." 722 N.W.2d at 490. A finding of probable cause for arrest on a crime of violence under the Maryland DNA Collection Act cannot serve as the probable cause for a DNA search of an arrestee.

ii. Government Interest

This Court accepted the State's argument in *Raines* that the purpose of the Maryland DNA Collection Act is to identify individuals, rather than to collect evidence.[33] While that may be true in the context of maintaining a record of inmates, felons, parolees, or probationers (as was the case regarding the scope of the Act at the time *Raines* was decided), in the present

---

[33] We note in the present case, as we did in *Raines*, that the express purposes of the statute are to analyze genetic material to assist in an official investigation of a crime, to identify human remains, to identify missing individuals, or for research and administrative purposes. Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-505.

case, identification is not what King's DNA sample was used for or needed, and, in most circumstances, will likely not be the case with other arrestees. Solving cold cases, in the State's view, is an ancillary benefit of determining the proper identification of an individual, but for King it was the only State interest served by the collection of his DNA. The State here can not claim the same public safety interests present in cases addressing convicted felons, parolees, or probationers. There is no interest in prison safety or administration present. Although we have recognized (and no one can reasonably deny) that solving cold cases is a legitimate government interest, a warrantless, suspicionless search can not be upheld by a "generalized interest" in solving crimes.

Courts upholding statutes authorizing DNA collection from arrestees rely on an expansive definition of "identification" to sweep-up "cold case" crime-solving as a government purpose recognized and approved previously by courts in other contexts. This expanded definition of identity encompasses the traditional name, date of birth, address, and physical characteristics, but also "what that person has done," including his/her past known criminal record and as-yet-unsolved crimes. *See Haskell*, 677 F. Supp. 2d at 1199. Although the State does not advance directly this argument here, it is implicated by the State's heavy reliance on forms of "identification" (or evidence, as the case may be) that may have been collected from previous crimes and compared to the "identification" of an arrestee. Such an argument stretches the bounds of reasonableness under our view of proper Fourth Amendment analysis. We decline to accept it in light

of its impacts on an arrestee's expectations of privacy in his or her genetic material, unless that material is deemed properly abandoned.

The State argues that it has a legitimate purpose in identifying accurately arrestees. Accepting this argument *arguendo*, the State presented no evidence that it had any problems whatsoever identifying accurately King through traditional booking routines. King had been arrested previously, given earlier fingerprint samples, and been photographed. There is no claim that King presented false identification when arrested or had altered his fingerprints or appearance in any way that might increase the State's legitimate interest in requiring an additional form of identification to be certain who it had arrested. The FBI's fingerprint database is a reliable method for law enforcement to identify (or confirm the identities of) arrestees promptly and accurately. When an arrestee's fingerprints are uploaded to the database, the results (which include a photograph, fingerprints, and a criminal history) are returned within minutes. This system contains not only criminal records, but also fingerprints uploaded voluntarily by citizens. This database is essential to law enforcement during routine booking of arrestees. On the other hand, the FBI's DNA database contains no personal identifying information, no names, no birth dates, no social security numbers, and no criminal histories. A "hit" may take months to return. The DNA sample is not analyzed until after the first scheduled arraignment date. The profile must be uploaded and the database searched. The laboratory must return the DNA profile. When a "hit" arises, a law enforcement officer

is notified, who must request the additional information.

King was arrested on 10 April 2009. The "hit" was returned on 4 August 2009. At this point, King had been identified accurately via other methods. There is no evidence that the DNA "hit" bolstered or clarified his already confirmed identity.

The State's purported interests are made less reasonable by the fact that DNA collection can wait until a person has been convicted, thus avoiding all of the threats to privacy discussed in this opinion. DNA profiles do not change over time (as far as science "knows" at present), so there is no reasonable argument that unsolved past or future crimes will go unresolved necessarily. We simply will not allow warrantless, suspicionless searches of biological materials without a showing that accurate identification was not possible using "traditional" methods.

In cases where DNA is required for conviction, there will be likely substantial other evidence to provide probable cause for a search warrant. Unfortunately, that does not seem likely in the present case. As regards King's 2009 assault charge that gave rise to collection of his initial compelled DNA sample, the State proceeded to *nolle prosequi* all of the qualifying crimes. King was convicted only of second-degree assault, which is not a qualifying crime

under § 2-504.[34]

As regards to King's facial challenge to the Act, a party challenging facially the constitutionality of a statute "must establish that no set of circumstances exist under which the Act would be valid." *Koshko*, 398 Md. at 426, 921 A.2d at 184 (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100, 95 L. Ed. 2d 697, 707 (1987)). In *Salerno*, the Supreme Court set out, in dictum, the "no set of circumstances" test that is used broadly to decide facial constitutional challenges; however, the over-arching distinction between facial and as-applied challenges, in the wake of Salerno, has been less than clear. *See, e.g.*, Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 Wm. & Mary Bill Rts. J. 657, 658 (2010). The Supreme Court, post-Salerno, has not applied consistently the "no set of circumstances" test to facial challenges. *See City of Chicago v. Morales*, 527 U.S. 41, 55, n.22, 119 S. Ct. 1849, 1858, n.22, 144 L. Ed. 2d 67, 79, n.22 (1999) ("To the extent we have consistently articulated a clear standard for facial challenges, it is not the Salerno formulation, which has never been the decisive factor in any decision of this Court . . ."); *Chandler v. Miller*, 520 U.S. 305, 318, 117 S. Ct. 1295, 1303, 137 L. Ed. 2d 513, 526 (1997)

---

[34] Because of the combination of the State's choice to nol pros these charges and the compulsion, on remand of the present case, that King's motion to suppress be granted, King can be tried on the qualifying charges and it is unlikely that a new DNA sample may be obtained under the Act.

(sustaining a facial attack on a Georgia statute requiring drug tests for political candidates, without mentioning the Salerno standard); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202, 128 S. Ct. 1610, 1623, 170 L. Ed. 2d 574, 590-91 (2008) (concluding that "a facial challenge must fail where the statute has a plainly legitimate sweep") (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, 128 S. Ct. 1184, 1190, 170 L. Ed 2d 151, 160 (2008) (internal quotations omitted)). Despite the unclear application of Salerno among the federal courts, we apply the test here according to *Koshko*. We conclude that King's facial challenge to the statute fails because there are conceivable, albeit somewhat unlikely, scenarios where an arrestee may have altered his or her fingerprints or facial features (making difficult or doubtful identification through comparison to earlier fingerprints or photographs on record) and the State may secure the use of DNA samples, without a warrant under the Act, as a means to identify an arrestee, but not for investigatory purposes, in any event.[35]

The State posits that because King's DNA swab obtained only evidence of his identity the evidence is not suppressible. This argument runs counter to the Supreme Court's holdings in *Hayes*, 470 U.S. at 817,

---

[35] The possible scenarios where law enforcement may require DNA samples to identify an arrestee bring to mind the 1997 film *Face/Off* where a hypothetical face transplant was used to change identities.

105 S. Ct. at 1647, 84 L. Ed. 2d at 711, and *Davis*, 394 U.S. at 727, 89 S. Ct. at 1398, 22 L. Ed. 2d at 681, which concluded that fingerprints obtained illegally were suppressible under the Fourth Amendment. King's identity was not the evidence that served as probable cause for his grand jury rape indictment. A driver's license, fingerprint, photograph, or social security card, all accepted generally as forms of identification, could not have stood in the place of King's DNA sample before the grand jury. What was presented to the grand jury was a match between biological evidence collected from King's 2009 buccal swab and the evidence collected during a sexual assault forensic exam from the 2003 rape victim. This biological match is not analogous to a person's name or address, which the Court of Special Appeals held not to be suppressible in *Gibson v. State*, 138 Md. App. 399, 414, 771 A.2d 536, 545 (2001). Assuming *arguendo* that fingerprints and DNA present an apt analogy, they are both suppressible evidence when obtained illegally.

As we conclude that the Maryland DNA Collection Act, as applied to King as an arrestee, was unconstitutional, and King's 10 April 2009 DNA sample was obtained illegally, we must conclude that the second DNA sample, obtained on 18 November 2009, pursuant to a court order based on probable cause gained solely from the "hit" from the first compelled DNA sample, is suppressible also as a "fruit of the poisonous tree." The "fruit of the poisonous tree" doctrine excludes evidence obtained in violation of the Fourth Amendment. *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 417, 9 L. Ed. 2d 441, 456

(1963); *Myers v. State*, 395 Md. 261, 291, 909 A.2d 1048, 1066 (2006). Under the "fruit of the poisonous tree" doctrine, the defendant bears the burden of showing 1) primary illegality and 2) "the cause and effect relationship between the primary illegality and the evidence in issue, to wit, that the evidence was, indeed, the identifiable fruit of that particular tree." *Cox v. State*, 421 Md. 630, 651-52, 28 A.3d 687, 699 (2011) (citing *Gibson*, 138 Md. App. at 404, 771 A.2d at 539). Here, we have determined that the original DNA collection was illegal. The cause-and-effect relationship between King's original buccal swab and the court-ordered second buccal swab is not attenuated in any way. The first buccal swab provided the sole probable cause for King's first-degree rape grand jury indictment. There was no other evidence linking King to the 2003 unsolved rape. Were it not for the buccal swab obtained illegally after King's assault arrest, there would be no second DNA sample which could have been used as evidence in King's trial for the charges enumerated in footnote seven, *supra*. The DNA evidence presented at trial was a fruit of the poisonous tree.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY REVERSED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE STATE.

[Barbera and Wilner, JJ., dissenting:]

I dissent. The Court decides today that the police violated King's Fourth Amendment right to be free from unreasonable searches, when the police, after arresting King based on probable cause that he had committed a violent crime, took a DNA sample via a buccal swab, pursuant to the Maryland DNA Collection Act, Maryland Code (2003, 2011 Repl. Vol.), § 2-504(a)(3) of the Public Safety Article (Act). The majority arrives at this decision by overinflating an arrestee's interest in privacy and underestimating the State's interest in collecting arrestee DNA, and in doing so, plays fast and loose with the well-recognized test for determining the constitutionality of warrantless searches.

It is not disputed--indeed there is no doubt--that the buccal swab was a "search," for purposes of the Fourth Amendment.[1] *See Skinner v. Ry. Labor Executives Ass'n*, 489 U.S. 602, 616, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989). The question, then, is whether this warrantless search complied with the strictures of the Fourth Amendment, the touchstone for which is "reasonableness." *United States v. Knights*, 534 U.S. 112, 118, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001); *accord Wilson v. State*, 409 Md. 415,

---

[1] It also is undisputed that law enforcement officials in the present case followed every one of the statutory and regulatory mandates of the Act when testing King's DNA sample and making use of its results.

427, 975 A.2d 877, 884 (2009). The test for ascertaining the answer to the reasonableness inquiry is one adopted by the Supreme Court long ago, *Terry v. Ohio*, 392 U.S. 1, 20-21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), and followed by this Court ever since, see *Anderson v. State*, 282 Md. 701, 704-05, 387 A.2d 281, 283 (1978); *Wilson*, 409 Md. at 427, 975 A.2d at 884.

Under that test, whether a given warrantless search is reasonable requires balancing the privacy interests of the individual searched against the legitimate government interests promoted by the search. *Samson v. California*, 547 U.S. 843, 848, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (2006); *accord Wilson*, 409 Md. at 427, 975 A.2d at 884. The test has been employed to uphold searches of persons in situations akin to the case at bar. *See, e.g., Samson*, 547 U.S. at 847 (holding that a police officer's warrantless, suspicionless search of a parolee was reasonable under the Fourth Amendment); *State v. Raines*, 383 Md. 1, 41, 857 A.2d 19, 43 (2004) (holding that the warrantless collection of DNA from "a certain group of convicted persons" was reasonable because "the minimal physical intrusion on the inmate, a person with a diminished expectation of privacy, is outweighed by the legitimate governmental interest in identifying persons involved with crimes, including vindicating those falsely convicted"); *see also Knights*, 534 U.S. at 122 (holding that balancing of the competing interests at stake rendered reasonable the warrantless search, supported by reasonable suspicion, of a probationer's home).

The majority recognizes that the balancing test is the appropriate test to determine the reasonableness, and hence the constitutionality, of the search at issue here. 425 Md. 550, 562-63, 42 A.3d 549, 556-57. Regrettably, both for the present case and all other future cases like it, the majority's application of the test to the circumstances here could not be more wrong. Proper analysis of the competing privacy and governmental interests at stake exposes the error.

To repeat, "reasonableness" depends on a balance between the governmental interests and the individual's right to personal security free from arbitrary interference by law officers. In assessing, first, the interests at stake for King, I bear in mind that consideration of the privacy interest implicated by the buccal swab involves identifying both the nature of the privacy interest enjoyed by King at the time of the swab and the character of the intrusion itself. *See Bell v. Wolfish*, 441 U.S. 520, 559, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) ("In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.").

The majority misstates the degree to which King's privacy was impinged by his arrest. The majority juxtaposes King's status as an arrestee with that of a convicted felon, probationer, or parolee, and then declares that King's privacy interest is "greater" than that of persons in those categories because he enjoys a presumption of innocence. 425 Md. at 593-95, 42 A.3d

at 575-76. Certainly, up to the moment of conviction, King enjoyed the presumption of innocence in connection with the crimes charged. Yet King's status as a presumed-innocent man has little to do with the reduced expectation of privacy attendant to his arrest, processing, and pre-trial incarceration (even if for but a short time). For purposes of the Fourth Amendment analysis, King's privacy expectation at the time of the cheek swab was far more like a convicted felon, probationer, and parolee than an uncharged individual. To make the point, I need mention only some of the intrusions on personal privacy that attend any arrest.

The lawful intrusions that could be, and likely were, visited upon King began at or soon after the moment of arrest. Any arrestee is lawfully subject to an immediate, head-to-toe search of his person and any personal belongings in his possession at the time. *See United States v. Robinson*, 414 U.S. 218, 235, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973). At the station-house, the arrestee can be subjected as a matter of protocol (and without the need for individualized suspicion) to a warrantless strip-search, even if the arrest is for a minor offense. *Florence v. Cnty. of Burlington*, 566 U.S. ____, 132 S. Ct. 1510, ____, 2012 U.S. LEXIS 2712, *36, slip op. at 19 (Filed April 2, 2012). *See also Bell*, 441 U.S. at 558 (approving body cavity searches of pre-trial detainees). Even if not strip-searched, the arrestee can be subject to observation, while in various stages of undress, by police officials; and the arrestee, if placed in a cell with or near other arrestees, can be subject to similar observation by them (or police officials) while using the toilet. *See Johnson v. Phelan*,

69 F.3d 144, 145, 150 (7th Cir. 1995). In short, any arrestee, including King, has a grossly diminished privacy expectation.

The majority's Fourth Amendment analysis also suffers from its mislabeling the character of the intrusion upon privacy and bodily integrity occasioned by the cheek swab, and the degree to which the arrestee's privacy interest is impinged as a result of the information obtained thereby. DNA collection in Maryland is achieved by rubbing and rotating a cotton swab on the inside of an individual's cheeks. This procedure involves placing a cotton instrument inside the mouth for a few seconds, and contacting the cheek with enough pressure to remove a biological sample. The buccal swab technique has been described as "perhaps the least intrusive of all seizures," Jules Epstein, *"Genetic Surveillance"-- The Bogeyman Response to Familial DNA Investigations*, 2009 U. Ill. J.L. Tech & Pol'y 141, 152 (2009) (hereafter "Epstein"), and a "relatively noninvasive means of obtaining DNA" that "pose[s] lowered risk for both the subject and laboratory personnel," Amy H. Walker, et al., *Collection of Genomic DNA by Buccal Swabs for Polymerase Chain Reaction-Based Biomarker Assays*, 107 Envtl. Health Perspective 517, 520 (1999).

A buccal swab is less physically invasive than the drawing of blood, which the Supreme Court addressed in *Schmerber v. California*, 384 U.S. 757, 771-72, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). The Court held in that case that the warrantless drawing of a blood sample from an arrestee, at the direction of a police officer, did not violate the Fourth Amendment

prohibition against unreasonable searches. The Court described the drawing of blood as "commonplace" and "involv[ing] virtually no risk, trauma, or pain." *Id.* at 771. Since then, the Supreme Court has characterized the intrusiveness of blood-drawing as "not . . . an unduly extensive imposition on an individual's personal privacy and bodily integrity," *Winston v. Lee*, 470 U.S. 753, 762, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985); and "not significant," *Skinner*, 489 U.S. at 625. If the subcutaneous removal of blood from a person's veins presents only a marginal intrusion into that person's privacy interest, a fortiori the insertion of a cotton swab into a person's mouth is less of an intrusion and fairly characterized as *de minimis*. Unlike the process of drawing blood, performing a buccal swab does not require skin to be pierced, or a hard, foreign object to be situated inside of the body.

In short, I agree with the reasoning of the United States Court of Appeals for the Ninth Circuit in *Haskell v. Harris*, 669 F.3d 1049, 1059 (9th Cir. 2012). The court in *Haskell* upheld a DNA collection statute that permits buccal swabs of all adults arrested for felonies explaining that,

> the physical extraction of DNA using a buccal swab collection technique is little more than a minor inconvenience to felony arrestees, who have diminished expectations of privacy. Moreover, it is substantially less intrusive, both physically and emotionally, than many of the other types of approved intrusions that are routinely visited upon arrestees.

accord United States v. Mitchell, 652 F.3d 387, 407 (3rd Cir. 2011) (noting, in a case upholding the constitutionality of a federal statute that authorizes DNA collection from arrestees, that "the intrusion occasioned by the act of collecting the DNA sample is minimal and does not weigh significantly in [the arrestee's] favor").

The amount and character of the information obtained from analysis of the cheek cells is also pertinent to the privacy interest analysis. Here too, the majority's analysis misses the mark. The Act authorizes the collection of biological material that contains an individual's entire genome. The majority seizes on this point, reasoning that "[a] DNA sample . . . contains within unarguably much more than a person's identity[,]" 425 Md. at 596, 42 A.3d at 577, and in that way is unlike a fingerprint, which only "can determine . . . a person's identity by matching the physical characteristics [of the fingerprint] to a known set of fingerprints," *id.* For this reason, notwithstanding that § 2-505(b) of the Act only authorizes DNA analysis for the purpose of identification, the majority is unable to "turn a blind eye to the vast genetic treasure map that remains in the DNA sample retained by the State." 425 Md. at 596, 42 A.3d at 577.

I could not disagree more. I interpret the majority's concerns as much like those expressed by the plaintiffs in *Haskell*, *supra*, which the court described as "evok[ing] images of an oppressive 'Big Brother' cataloging our most intimate traits." 669 F.3d at 1059. I, like the Ninth Circuit, believe that "the reality is far

less troubling." *See id.* The Act categorically prohibits the plundering of "the vast genetic treasure map" that is incidentally made available by DNA collection. Up to five years of imprisonment and/or a fine of up to $5,000, see § 2-512(e) of the Act, awaits anyone who "willfully test[s] a DNA sample for information that does not relate to the identification of individuals as specified in this subtitle," § 2-512(c) of the Act. The same potential punishments await anyone who discloses information from a DNA profile, or discloses genetic information from the collected DNA sample itself. *See* § 2-512(a) of the Act. In short, the Act forecloses, without exception, all avenues by which a genetic pirate can obtain and exploit the "genetic treasure map" contained within a collected DNA sample.

Even more important to the privacy assessment is that the procedure by which DNA samples are tested cannot disclose intimate genetic information. COMAR 29.05.01.09(A) effectively restricts the testing of DNA to the 13 loci specified by the FBI and CODIS. These specific loci are non-coding; "in other words, the genetic material at these locations is not known to determine a human attribute such as height, weight, or susceptibility to a particular disease." *Epstein*, *supra* at 143. We have recognized the non-coding nature of these 13 loci, sometimes referred to as "junk" loci, in *Williamson v. State*, 413 Md. 521, 542-43, 993 A.2d 626, 639 (2010). These 13 loci exist in a "hypervariable region" of the DNA strand. "Outside of the hypervariable regions, the genomes of two randomly chosen individuals exhibit few differences. In contrast, within the hypervariable regions, two randomly chosen

individuals will exhibit a number of differences." Julian Adams, *Nuclear and Mitochondrial DNA in the Courtroom*, 13 J.L. & Pol'y 69, 74 (2005). Therefore, the loci cannot reveal any genetic information about an arrestee, other than that the arrestee is identifiably different from other members of the human race. And in showing that an arrestee's DNA is identifiably different from others' DNA, the loci can potentially show that an arrestee's DNA is identical to strands of DNA collected from an unknown source, i.e. a crime scene. *See Raines*, 383 Md. at 25, 857 A.2d at 33 ("the only information obtained from the DNA linked to the individual pursuant to the Act is the DNA identity of the person being tested.").

Though surely a far more sophisticated and "new" means of identification than fingerprints, DNA analysis, when used solely for purposes of identification is, in the end, no different. Both are limited markers that can reveal only identification information. As Judge Raker aptly pointed out in her concurring opinion in *Raines*:

> DNA type need be no more informative than an ordinary fingerprint . . . . The "profile" of an individual's DNA molecule that is stored in a properly constructed DNA identification database (like the FBI's Combined DNA Index System (CODIS)) is a series of numbers. The numbers have no meaning except as a representation of molecular sequences at DNA loci that are not indicative of an individual's personal traits or

> propensities. In this sense, the CODIS 13-STR "profile" is very much like a social security number–though it is longer and is assigned by chance, not by the federal government.

Id. at 45, 857 A.2d at 45-46 (Raker, J., concurring) (quoting D. Kaye and M. Smith, *DNA Identification Databases, Legality, Legitimacy, and the Case for Population-Wide Coverage*, 2003 Wis. L. Rev. 413, 431-32 (2003)). In this way, the numbers of a DNA profile are identical to the ridges of a fingerprint–the information derived from both is, as the majority concedes, " related only to physical characteristics and can be used to identify a person, but no more." 425 Md. at 595-96, 42 A.3d at 576-77.

The Supreme Court has given, albeit impliedly, the constitutional "go ahead" for the fingerprinting procedure. *See Hayes v. Florida*, 470 U.S. 811, 817, 105 S. Ct. 1643, 84 L. Ed. 2d 705 (1985) ("There is thus support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch."). Given the similarity of fingerprinting and the DNA collection authorized by the Act, there is little concern that the Act implicates a weighty privacy interest.

Furthermore, if an arrestee has any interest in the information extracted from collected DNA, it is a privacy interest in the identification information revealed by the 13 loci. Given the already-diminished expectation an arrestee has in privacy generally, an arrestee can have only a modicum of interest in identity privacy, if any interest at all. *Cf. Raines*, 383 Md. at 25, 857 A.2d at 33 ("As such, appellee and other incarcerated individuals have little, if any, expectation of privacy in their identity.").

On the other side of the Fourth Amendment reasonableness balancing equation is the State's interest in the use and retention of DNA evidence. I need not discuss here the significance of all the government interests at stake, although there are at least three: identifying arrestees, solving past crimes, and exonerating innocent individuals. *See Haskell*, 669 F.3d at 1062-65 (discussing those interests); *Mitchell*, 652 F.3d at 413-15 (same).

We emphasized in *Raines* that identifying perpetrators of crimes is a "compelling governmental interest." 383 Md. at 21, 857 A.2d at 31. In responding to this strong law enforcement interest, the majority eludes faithful application of the case law on the subject of "identity," by carefully circumscribing its meaning. The majority reasons that "identity" includes only an individual's name, age, address, and physical characteristics, but does not include "what [the] person has done." 425 Md. at 598-99, 42 A.3d at 578. Based on this reasoning, the majority notes that the government can claim no legitimate interest in identifying an individual for the purpose of uncovering

past misdeeds. *Id.* From that premise the majority holds that the Act is unconstitutional as applied to King because King's DNA collection was superfluous: the identification interest already was served by the fingerprinting and photographing of King. 425 Md. at 599-601, 42 A.3d at 579-80.

On the majority's first point, nothing in the law supports the majority's restrictive definition of identity. In the context of the Fourth Amendment, the Supreme Court has made clear that law enforcement's interest in identity extends to knowing whether a person has been involved in crime. *See Hiibel v. Sixth Judicial Dist. Ct.*, 542 U.S. 177, 186, 124 S. Ct. 2451, 159 L. Ed. 2d 292 (2004) ("Obtaining a suspect's name in the course of a Terry stop serves important government interests. Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder."). The majority's definition raises the rhetorical question: "Why law enforcement would want to know a person's name, if not to know whether that person is linked to crime?"

On the second point, the majority essentially holds that DNA collection cannot displace traditional methods of identification because those traditional methods are less intrusive and in use effectively. 425 Md. at 600-01, 42 A.3d at 579-80. The Court of Appeals for the Ninth Circuit in *Haskell* characterized such reasoning as "a Luddite approach" to Fourth Amendment interpretation. 669 F.3d at 1063. "Nothing in the Constitution compels us to . . . prevent the Government from using this new and highly

effective tool [of identification] to replace (or supplement) older ones." *Id.* Moreover, the Supreme Court has been clear in "repeatedly refus[ing] to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment." *City of Ontario v. Quon*, 130 S. Ct. 2619, 2632, 177 L. Ed. 2d 216 (2010) (quoting *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 663, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995)). Finally, as this Court recognized in *Raines*, "[i]t is not for us to weigh the advantages of one method of identification over another." 383 Md. at 20, 857 A.2d at 30 (quoting *Jones v. Murray*, 962 F.2d 302, 308 (4th Cir. 1992)).

Even assuming that the government's strong interest in identifying perpetrators of crime is the only interest at stake in this case (which it is not), that interest, when balanced against the significantly diminished expectation of privacy attendant to taking a buccal swab of an arrestee, yields, in my view, an obvious answer to the question presented in this case. The swab of King's inner cheek to extract material from which 13 DNA "junk" loci are tested to identify him is a reasonable search, and therefore permitted by the Fourth Amendment. I therefore would affirm the judgment of the Circuit Court for Wicomico County.

Judge Wilner authorizes me to state that he joins the views expressed here.

Supreme Court of the United States

No. 12A48

MARYLAND,

Applicant

v.

ALONZO J. KING, JR.

ORDER

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the judgment and mandate of the Court of Appeals of Maryland, case No. 68, is hereby stayed pending receipt of a response, due on or before Wednesday, July 25, 2012, by 4 p.m., and further order of the undersigned or of the Court.

/s/ John G. Roberts, Jr.
Chief Justice of the United States

Dated this 18th
day of July, 2012.

SUPREME COURT OF THE UNITED STATES

No. 12A48

MARYLAND v. ALONZO JAY KING, JR.

ON APPLICATION FOR STAY

[July 30, 2012]

CHIEF JUSTICE ROBERTS, Circuit Justice.

Maryland's DNA Collection Act, Md. Pub. Saf. Code Ann. §2-501 *et seq.* (Lexis 2011), authorizes law enforcement officials to collect DNA samples from individuals charged with but not yet convicted of certain crimes, mainly violent crimes and first-degree burglary. In 2009, police arrested Alonzo Jay King, Jr., for first-degree assault. When personnel at the booking facility collected his DNA, they found it matched DNA evidence from a rape committed in 2003. Relying on the match, the State charged and successfully convicted King of, among other things, first-degree rape. A divided Maryland Court of Appeals overturned King's conviction, holding the collection of his DNA violated the Fourth Amendment because his expectation of privacy outweighed the State's interests. 425 Md. 550, 42 A. 3d 549 (2012). Maryland now applies for a stay of that judgment pending this Court's disposition of its petition for a writ of certiorari.

To warrant that relief, Maryland must demonstrate

(1) "a reasonable probability" that this Court will grant certiorari, (2) "a fair prospect" that the Court will then reverse the decision below, and (3) "a likelihood that irreparable harm [will] result from the denial of a stay." *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (GINSBURG, J., in chambers) (internal quotation marks omitted).

To begin, there is a reasonable probability this Court will grant certiorari. Maryland's decision conflicts with decisions of the U.S. Courts of Appeals for the Third and Ninth Circuits as well as the Virginia Supreme Court, which have upheld statutes similar to Maryland's DNA Collection Act. See *United States v. Mitchell*, 652 F. 3d 387 (CA3 2011), cert. denied, 566 U.S. ___ (2012); *Haskell v. Harris*, 669 F. 3d 1049 (CA9 2012), reh'g en banc granted, 2012 WL 3038593 (July 25, 2012); *Anderson v. Commonwealth*, 274 Va. 469, 650 S.E. 2d 702 (2007), cert. denied, 553 U.S. 1054 (2008); see also *Mario W. v. Kaipio*, 2012 WL 2401343 (Ariz. 2012) (holding that seizure of a juvenile's buccal cells does not violate the Fourth Amendment but that extracting a DNA profile before the juvenile is convicted does).

The split implicates an important feature of day-to-day law enforcement practice in approximately half the States and the Federal Government. Reply to Memorandum in Opposition 3; see 114 Stat. 2728, as amended, 42 .S.C. §14135a(a)(1)(A) (authorizing the Attorney General to "collect DNA samples from individuals who are arrested, facing charges, or convicted"). Indeed, the decision below has direct effects beyond Maryland: Because the DNA samples Maryland collects may otherwise be eligible for the FBI's national DNA database, the decision renders the

database less effective for other States and the Federal Government. These factors make it reasonably probable that the Court will grant certiorari to resolve the split on the question presented. In addition, given the considered analysis of courts on the other side of the split, there is a fair prospect that this Court will reverse the decision below.

Finally, the decision below subjects Maryland to ongoing irreparable harm. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (REHNQUIST, J., in chambers). Here there is, in addition, an ongoing and concrete harm to Maryland's law enforcement and public safety interests. According to Maryland, from 2009—the year Maryland began collecting samples from arrestees—to 2011, "matches from arrestee swabs [from Maryland] have resulted in 58 criminal prosecutions." Application 16. Collecting DNA from individuals arrested for violent felonies provides a valuable tool for investigating unsolved crimes and thereby helping to remove violate offenders from the general population. Crimes for which DNA evidence is implicated tend to be serious, and serious crimes cause serious injuries. That Maryland may not employ a duly-enacted statute to help prevent these injuries constitutes irreparable harm.

King responds that Maryland's eight-week delay in applying for a stay undermines its allegation of irreparable harm. In addition, he points out that of the 10,666 samples Maryland seized last year, only 4,327 of them were eligible for entry into the federal database and only 19 led to an arrest (of which fewer

than half led to a conviction). Memorandum in Opposition 11. These are sound points. Nonetheless, in the absence of a stay, Maryland would be disabled from employing a valuable law enforcement tool for several months—a tool used widely throughout the country and one that has been upheld by two Courts of Appeals and another state high court.

Accordingly, the judgment and mandate below are hereby stayed pending the disposition of the petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court.

It is so ordered.

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

No. 12-207

IN THE
Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

ALONZO JAY KING, JR.,
Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF OF PETITIONER

DOUGLAS F. GANSLER
Attorney General of Maryland

KATHERINE WINFREE
Chief Deputy Attorney General

BRIAN S. KLEINBORD*
ROBERT TAYLOR, JR.

MARY ANN RAPP INCE
DANIEL J. JAWOR
CARRIE J. WILLIAMS
Assistant Attorneys General

Office of the Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6435
bkleinbord@oag.state.md.us
Counsel for Petitioner
**Counsel of Record*

Library of Congress
Law Library

QUESTION PRESENTED

Does the Fourth Amendment allow the States to collect and analyze DNA from people arrested and charged with serious crimes?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties below.

TABLE OF CONTENTS

QUESTION PRESENTED. i

PARTIES TO THE PROCEEDING. ii

OPINIONS AND ORDERS. 1

STATEMENT OF JURISDICTION. 1

CONSTITUTIONAL PROVISIONS INVOLVED. 2

STATEMENT OF THE CASE. 2

SUMMARY OF ARGUMENT. 8

ARGUMENT:

THE COLLECTION OF IDENTIFYING DNA INFORMATION AFTER A LAWFUL ARREST IS REASONABLE. 11

A. The search authorized by the DNA Collection Act involves only a minimal intrusion. 13

1. By law, the only information at stake is an arrestee's identity. 14

2. People arrested for violent crimes have reduced expectations of privacy generally, and no legitimate expectation of anonymity specifically. 16

3. The presumption of innocence does not buoy an arrestee's privacy interest. . . . 20

B. The search authorized by the DNA Collection Act greatly advances important governmental interests. 21

1. DNA profiles of arrestees serve the same goals of unparalleled accuracy in identification as DNA profiles of convicted offenders. 21

2. The State has an interest in solving crimes as expeditiously as possible. . . . 23

CONCLUSION. 26

TABLE OF AUTHORITIES

Cases:

Bell v. Wolfish,
441 U.S. 520 (1979) 20

Bruno v. State,
332 Md. 673 (1993). 5

Camara v. Mun. Court of San Francisco,
387 U.S. 523 (1967) 11

Davis v. Mississippi,
394 U.S. 721 (1969) 18

Delaware v. Prouse,
440 U.S. 648 (1979) 12

Doe v. Sheriff of DuPage County,
128 F.3d 586 (7th Cir. 1997) 9

Dist. Attorney's Office v. Osborne,
557 U.S. 52 (2009) 22

Downs v. Swan,
111 Md. 53 (1909) 8, 19

Haskell v. Harris,
669 F.3d 1049 (9th Cir. 2012).. 13

Hiibel v. Sixth Judicial Dist. Court,
542 U.S. 177 (2004) 18

Illinois v. Lafayette,
462 U.S. 640 (1983) 17

In re Forfeiture Hearing,
837 F.2d 637 (4th Cir. 1988) 21

In re Grand Jury Proceedings (Mills),
686 F.2d 135 (3d Cir. 1982). 19

INS v. Delgado,
466 U.S. 210 (1984) 18

Jones v. Murray,
962 F.2d 302 (4th Cir. 1992) 22

NASA v. Nelson,
131 S.Ct. 746 (2011) 15

Nat'l Treasury Employees Union v. Von Raab,
489 U.S. 656 (1989) 12

New Jersey v. T.L.O.,
469 U.S. 325 (1985) 11, 12

Pennsylvania v. Mimms,
434 U.S. 106 (1977) 11

Samson v. California,
547 U.S. 843 (2006) . . . . . 5, *passim*

Schmerber v. California,
384 U.S. 757 (1966). 13

Skinner v. Ry. Labor Executives' Ass'n,
489 U.S. 602 (1989) 12

State v. Raines,
383 Md. 1 (2004) 6, 20

Terry v. Ohio,
392 U.S. 1 (1968) 11

United States v. Dillard,
214 F.3d 88 (2d Cir. 2000) 21

United States v. Dionisio,
410 U.S. 1 (1973) 19

United States v. Edwards,
415 U.S. 800 (1974) 17

United States v. Jacobsen,
466 U.S. 109 (1984) 18

United States v. Kelly,
55 F.2d 67 (2d Cir. 1932) 8, 19

United States v. Knights,
534 U.S. 112 (2001) . . . . . 5, *passim*

United States v. Koskotas,
888 F.2d 254 (2d Cir. 1989) 21

United States v. Mara,
410 U.S. 19 (1973) 19

United States v. Mitchell,
652 F.3d 387 (3d Cir. 2011) 13

United States v. Robinson,
414 U.S. 218 (1973) 17

Vernonia School Dist. 47J v. Acton,
515 U.S. 646 (1995) 15

Washington State Grange v. Washington State Republican Party,
552 U.S. 442 (2008) 14

Whalen v. Roe,
429 U.S. 589 (1977) 14

Wyoming v. Houghton,
526 U.S. 295 (1999) 11

Constitutional Provisions:

United States Constitution:

Amendment IV. . . . . 2, *passim*

Amendment XIV. 2

Statutes:

Annotated Code of Maryland,

Public Safety Article:

2-501 3

2-503 . . . . . 3, 16

2-504 . . . . . 3, *passim*

2-505 . . . . . 3, *passim*

2-506 3

2-510 3

2-511 . . . . . 3, 18

2-512 . . . . . 4, 16

28 U.S.C. § 1257 1

Rules:

Supreme Court Rule 13 1

Fed. R. Crim. P. 11 5

Miscellaneous:

1994 Md. Laws 458 2

2002 Md. Laws 465 2

2008 Md. Laws 337 3

Md. Code Regs. 29.05.01.02 (2012) 14

James E. Hooper, *Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act*, 89 Mich. L. Rev. 1951 (1991) 24

FBI Laboratory Services, *CODIS and NDIS Fact Sheet*. 16

R.C. Li and H.A. Harris, *Using Hydrophilic Adhesive Tape for Collection of Evidence for Forensic DNA Analysis*, 48 J. Forensic Sci. 1318 (Nov. 2003) 14

Sara H. Katsanis and Jennifer K. Wagner, *Characterization of the Standard and Recommended CODIS Markers*, __ J. Forensic Sci. __ (Aug. 2012) 15

Michael J. Saks, *Merlin & Solomon: Lessons from the Law's Formative Encounters with Forensic Identification Science*, 49 Hastings L.J. 1069 (1998) 20

U.S. Dep't of Justice, Bureau of Justice Statistics, *Violent Felons In Large Urban Counties* at 4 (2006) 24

OPINIONS AND ORDERS

The order of the Circuit Court for Wicomico County, Maryland, denying King's motion to suppress is not reported. (JA 47). The order of the Court of Appeals of Maryland granting certiorari review before judgment in the Court of Special Appeals of Maryland is reported at 422 Md. 353, 30 A.3d 193 (2011). (Apx. to Pet. for Writ of Cert. 86b). The opinion of the Court of Appeals of Maryland reversing the judgment of the Circuit Court for Wicomico County is reported at 425 Md. 550, 42 A.3d 549 (2012). (JA 83). The order of the Court of Appeals of Maryland denying the State of Maryland's motion for reconsideration is unreported. (Apx. to Pet. for Writ of Cert. 87b). The Chief Justice's chambers opinion staying the decision and mandate of the Court of Appeals of Maryland is reported at 133 S. Ct. 1 (2012). (JA 168). The order of this Court granting the State of Maryland's petition for a writ of certiorari is reported at 133 S. Ct. 594 (2012).

STATEMENT OF JURISDICTION

The decision of the Court of Appeals of Maryland was filed on April 24, 2012. The order of that court denying the State of Maryland's motion for reconsideration was filed on May 18, 2012. The petition for a writ of certiorari was filed on August 14, 2012, within 90 days of the denial of the motion for reconsideration as required by Rule 13 of the Rules of the Supreme Court of the United States. The petition was granted on November 9, 2012. The jurisdiction of this Court lies under 28 U.S.C. § 1257(a) (2006).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In 1994, the Maryland General Assembly created a statewide DNA database. 1994 Md. Laws 458. In 2002, the legislature expanded the reach of the database by mandating the collection of identifying DNA samples from anyone convicted of a felony after October 1, 2002, or otherwise already incarcerated for a felony on that date. 2002 Md. Laws 465. In 2008, the legislature amended the law to require the collection of an identifying DNA sample from people arrested for certain serious offenses: crimes of violence, burglary,

and attempts to commit those crimes. 2008 Md. Laws 337. For the collection of these samples, the Act does not require an initial warrant, nor does it require individualized suspicion separate and apart from that justifying the arrest on the qualifying charge. The statute is currently codified at Md. Code Ann., Pub. Safety § 2-501 *et seq.* (LexisNexis 2011 Repl. Vol.) ("the DNA Collection Act" or "the Act").

The collection of DNA samples is strictly regulated. The State may only gather "DNA records that directly relate to the identification of individuals[.]" *Id.* § 2-505(b). All samples and records are kept exclusively by the State crime laboratory. *Id.* § 2-506. The match of a known sample to a crime scene sample in a database is not itself used as evidence in any subsequent trial; rather, that match is used as probable cause to obtain a second sample from the suspect, which is again analyzed and compared to the crime scene sample. The second match is what is introduced at trial. *Id.* § 2-510.

Arrestee samples, in particular, are subject to a number of regulations. These samples may not be analyzed until after the suspect's first appearance in court. *Id.* § 2-504(d)(1). If at the suspect's first appearance a judicial officer determines that the qualifying charge is not supported by probable cause, the sample must be immediately destroyed without analysis. *Id.* § 2-504(d)(2). Similarly, the State must destroy a DNA sample and expunge all related DNA records if no conviction arises from the related charges, or the conviction is reversed, vacated, or pardoned. *Id.* § 2-511. Any records not expunged as directed are excluded from use "in any proceeding for any purpose." *Id.* § 2-511(f)(2). The misuse of DNA information–

including unauthorized disclosure, unauthorized use of the database, unauthorized testing of samples, or the "[w]illful failure to destroy" a qualified sample–is classified as a misdemeanor, punishable by imprisonment of up to five years, a $5,000 fine, or both. *Id.* § 2-512. The State began collecting DNA samples from qualifying arrestees on January 1, 2009.

In April of 2009, Alonzo Jay King was arrested and charged with multiple counts of first- and second-degree assault. First-degree assault is a qualifying crime of violence under the Act, and, therefore, King was required to submit to a buccal swab of his cheek for use in DNA testing within the guidelines of the Act. After King's first appearance, during which a judicial officer determined that probable cause existed to charge King with first-degree assault, a DNA test of the buccal swab yielded an identifying DNA profile, and the State submitted that profile to the national DNA database, known as the Combined DNA Index System (CODIS), for comparison to any unknown DNA profile on file. This comparison yielded a match between King's DNA and the previously unknown DNA recovered from the 2003 rape of Vonette W. in Wicomico County, Maryland. Based on the DNA match, King was charged with the 2003 rape and robbery.[1]

King moved to suppress the DNA evidence before his trial on the 2003 rape, arguing, among other

---

[1] King eventually entered an *Alford* plea to one count of second-degree assault in the 2009 incident (JA 4), which did not independently qualify him for DNA testing under the separate convicted-felon provisions of the Act.

things, that the 2008 amendments to the DNA Collection Act violated the Fourth Amendment. The trial court denied his suppression motion. (JA 56). King was ultimately tried on an agreed statement of facts on a single count of first-degree rape, and on July 27, 2010, he was convicted of that charge. (JA 2).[2] He appealed his conviction to Maryland's intermediate appellate court, raising the same Fourth Amendment challenge. The appeal was removed to the Court of Appeals of Maryland on that court's own motion before judgment.

In its decision below, the Court of Appeals acknowledged that it had "previously [ ] upheld the constitutionality of the Act, as applied to convicted felons," but observed that it was now being called upon to consider an extension of the statute that concerned arrestees. (JA 85). Relying on *Samson v. California*, 547 U.S. 843 (2006) and *United States v. Knights*, 534 U.S. 112 (2001) for a "totality of the circumstances balancing test" (JA 85), the Court of Appeals concluded that King had a "sufficiently weighty and reasonable expectation of privacy against warrantless, suspicionless searches that [was] not outweighed by the State's purported interest in assuring proper identification of him as to the crimes for which he was charged at the time." (JA 85). The court found that because the State had already "identified King

---

[2] An agreed statement of facts serves in Maryland the same purpose that a conditional guilty plea serves in the federal system, that is, to preserve the appealability of certain pretrial motions without the expense of conducting an actual trial. Fed. R. Crim. P. 11(a)(2) ("Conditional Plea"); *Bruno v. State*, 332 Md. 673, 689, 632 A.2d 1192, 1200 (1993).

accurately and confidently through photographs and fingerprints," it had "no legitimate need for a DNA sample in order to be confident who it arrested or to convict him on the first- or second-degree assault charges." (JA 85).

The court believed that "at the heart of this debate" is the "presumption of innocence cloaking arrestees and whether legitimate government interests outweigh the rights of a person who has not been adjudicated guilty of the charged crime." (JA 112). Operating from that premise, the court determined that an arrestee is "somewhere closer along the continuum to a person who is not charged with a crime than he or she is to someone convicted of a crime." (JA 112). The court imposed upon the State "the burden of overcoming the arrestee's presumption of innocence and his expectation to be free from biological searches before he is convicted of a qualifying crime." (JA 140).

The court also employed the presumption of innocence as a means of distinguishing its earlier decision in *State v. Raines*, 383 Md. 1, 857 A.2d 19 (2004), which upheld the DNA Collection Act as applied to convicted felons. According to the court, it was the presumption of innocence that tipped the scale in King's favor in this case: "If application of the balancing test result[ed] in a close call when considering convicted felons," the court observed, "then the balance must tip surely in favor of our closely-held belief in the presumption of innocence here." (JA 141).

Further, the court "d[id] not embrace wholly the analogy between fingerprints and DNA samples." (JA 142). While accepting that a buccal swab constituted a "minimal" physical intrusion, the court nevertheless

found the swab "distinct" from a fingerprint for Fourth Amendment purposes. (JA 143). The court explained that it did so because, although the statute has built-in safeguards against misuse of information, it could "not turn a blind eye to the vast genetic treasure map that remains in the DNA sample retained by the State." (JA 143).

The two-judge dissent argued that the majority "overinflat[ed] an arrestee's interest in privacy and underestimat[ed] the State's interest in collecting arrestee DNA." (JA 154). The dissenters noted that the expectation of privacy for lawfully arrested individuals is greatly diminished and that the law already permits significant intrusions on an arrestee's privacy, including a full head-to-toe search incident to arrest, and a strip search and body cavity inspection upon entering the local jail. (JA 157). The dissent further emphasized that the buccal swab is a de minimis intrusion, and the privacy interest at stake is limited to "identification information revealed by the 13 loci" (JA 161), not wholesale genetic information. That privacy interest, the dissent said, was quite limited, if it existed at all.

The dissent also rejected the majority's claim that the government could rely on traditional and less intrusive methods of identification, and thus had no need for DNA collection. It noted that the State had a strong interest in using the most reliable form of identification, and deemed the majority's position "'a Luddite approach' to Fourth Amendment interpretation." (JA 165). Given that the law restricts testing to identification only, and "categorically prohibits the plundering of 'the vast genetic treasure

map' that is incidentally made available by DNA collection" (JA 160), the dissenters further stated that they "could not disagree more" with the majority's rejection of the analogy to fingerprints.

The Chief Justice, in his capacity as the Fourth Circuit Justice, granted a stay of the Court of Appeals' decision. (JA 168). This Court granted the State of Maryland's subsequent petition for a writ of certiorari on November 9, 2012.

SUMMARY OF ARGUMENT

For centuries, public safety agencies have devised increasingly accurate techniques to identify individuals in their custody. These agencies have sought to collect and share identifying information in a standardized format to discover recidivists and solve crimes. Thus, in the late nineteenth century, the Bertillon system emerged; in the early twentieth century, forensic fingerprinting rose to preeminence. American courts have universally upheld these identification techniques against constitutional challenge. *See, e.g., United States v. Kelly*, 55 F.2d 67 (2d Cir. 1932) (fingerprinting); *Downs v. Swan*, 111 Md. 53, 73 A. 653 (1909) (Bertillon system). DNA identification is simply the most recent of these techniques, the Fourth Amendment legitimacy of which has never been seriously doubted.

The Fourth Amendment protects people against unreasonable searches and seizures. The arrestee provisions of the DNA Collection Act authorize a constitutionally reasonable search under a totality of the circumstances analysis, in which this Court weighs

the degree of intrusion upon the privacy interest at stake against the degree to which the search furthers legitimate governmental interests. *Samson*, 547 U.S. at 848; *Knights*, 534 U.S. at 118-19.

On one side of the scale, the degree of intrusion is minimal. The DNA is taken by a buccal swab—a quick and painless rubbing of the cheek. The Act allows for the production of only a very limited amount of strictly identifying information from that swab. Arrestees have a reduced expectation of privacy generally, and when it comes to identity specifically, no legitimate expectation of privacy. The loss of liberty that flows from a finding of probable cause necessarily entails a loss of privacy in one's identity. Once lawfully in police custody, "the 'booking' of an arrestee, which for one thing confirms the person's identity, does not violate the Fourth Amendment." *Doe v. Sheriff of DuPage County*, 128 F.3d 586, 588 (7th Cir. 1997).

Additionally, from a Fourth Amendment perspective, the physical restrictions imposed upon an arrestee leave an arrestee situated similarly to a convicted offender in prison. And, contrary to the Court of Appeals' ruling, the presumption of innocence does not alter an arrestee's privacy interest. The presumption of innocence is a trial right that does nothing to change the restrictive conditions of pretrial custody that diminish an arrestee's expectation of privacy.

On the other side of the scale, the State's interests are significant. First, the State needs to accurately identify the people it has lawfully taken into custody, and DNA collection from arrestees serves the same

goals of unparalleled accuracy in identification as does DNA collection from convicted offenders. Second, by authorizing DNA collection at the time of arrest, the Act advances the State's interest in the supervision of pretrial detainees, which is not significantly different than its interest in the supervision of convicted offenders. Third, to the extent that DNA profiling leads to more efficient criminal investigations and prosecutions by accurately identifying a suspect, sampling arrestees advances the State's interest in acquiring this information when it can do the most good. Lastly, it is legitimate for the State to enact reasonable policies that enhance the efficacy of comparative DNA databases for solving crimes. By testing arrestees, the State expands the database in a reasonably targeted fashion, avoids squandering investigational resources, spares innocent persons from becoming mistaken suspects, and prevents additional crimes that might otherwise occur.

Further, the DNA Collection Act contains various safeguards that ensure the reasonableness of the search. It limits the discretion of individual police officers by mandating collection from those arrested for enumerated crimes. The Act criminalizes the misuse of samples, including improper testing. The Act does not allow for information to be retrieved from the samples until after the arrestee has been arraigned. And, finally, the Act contains an automatic expungement provision for an arrestee who is later cleared of all charges. For all these reasons the Court should conclude that the DNA Collection Act's arrestee provisions authorize a reasonable search under the Fourth Amendment.

ARGUMENT

THE COLLECTION OF IDENTIFYING DNA INFORMATION AFTER A LAWFUL ARREST IS REASONABLE.

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The touchstone of the Fourth Amendment is always "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)).

Reasonableness must be appraised in light of the circumstances surrounding the search. *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985). The test for reasonableness involves balancing two interests: "the degree to which [the search] intrudes upon an individual's privacy" and "the degree to which [the search] is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999); *see also Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 536-37 (1967) ("there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails").

Reasonableness requires neither a warrant nor probable cause in all cases. *T.L.O.*, 469 U.S. at 340-41 (citing cases). Indeed, not even individualized suspicion is an irreducible minimum of constitutional reasonableness: "The touchstone of the Fourth Amendment is reasonableness, not individualized suspicion. Thus, while this Court's jurisprudence has often recognized that 'to accommodate public and private interests[,] some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure,'. . . the 'Fourth Amendment imposes no irreducible requirement of such suspicion.'" *Samson*, 547 U.S. at 855 n.4 (citation omitted); *see also Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989) (reaffirming "the longstanding principle" that no "measure of individualized suspicion[] is an indispensable component of reasonableness in every circumstance"); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989) ("[A] showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable."). "Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" *T.L.O.*, 469 U.S. at 342 n.8 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979)).

This Court most recently applied this analysis in *Samson*, which involved the warrantless, suspicionless search of a parolee's person on a public street. Citing *Knights*, a similar case, the *Samson* Court balanced

the State's interests against the parolee's legitimate privacy expectations under the "totality of the circumstances." *Samson*, 547 U.S. at 848. The Court noted that as a parolee, Samson occupied a position on a "continuum" of state supervision that was somewhere between probation (as in *Knights*) and actual imprisonment. This level of supervision meant that his reasonable expectations of privacy were lowered. *Id.* at 850. The Court found that the government's "substantial" interest in reducing recidivism, *id.* at 853, when weighed against a parolee's "severely diminished expectations of privacy," *id.* at 852, meant that the search was "reasonable" under the Fourth Amendment.

The Court of Appeals of Maryland applied the *Knights/Samson* balancing test for reasonableness in this case, and indeed the same test has been applied in other cases on this topic. *United States v. Mitchell*, 652 F.3d 387, 403 (3d Cir. 2011); *see also Haskell v. Harris*, 669 F.3d 1049, 1053-1054, *vacated for en banc review*, 686 F.3d 1121 (9th Cir. 2012). Under that test, the DNA Collection Act's arrestee provisions authorize a reasonable search under the Fourth Amendment.

A. The search authorized by the DNA Collection Act involves only a minimal intrusion.

The search at issue in this case involves rubbing a small swab against the inside of an arrestee's cheek during booking. This is a de minimis invasion of personal integrity. *See Schmerber v. California*, 384 U.S. 757, 771 (1966) (invasiveness of blood draw not

significant).[3]

King's concern, of course, is not with the physical intrusiveness of the buccal swab, but with the nature of the information that is recovered from the swab. In this, he misperceives both the nature of that information and the legitimacy of his assumed right to anonymity.

1. By law, the only information at stake is an arrestee's identity.

This Court has long held that when assessing the constitutionality of a statute, it would consider the statute as written and not speculate about possible actions outside the purview of the law. *See, e.g., Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) (statute's presumptive correctness and deference by court requires that court not "go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases"). Thus, in *Whalen v. Roe*, 429 U.S. 589 (1977), this Court refused to find that a right to privacy was violated by a statute because a state agent might violate the restrictions on use and disclosure of

---

[3] The constitutionality of the Act does not rise and fall on the minor intrusion of swabbing. While a buccal swab is the means of collection currently prescribed by the Director of the State Police Forensic Sciences Division, Md. Code Regs. 29.05.01.02 (2012), that method is not fixed by the Act. In the future, DNA samples may be taken by a piece of adhesive tape on the arm or outer ear. R.C. Li and H.A. Harris, *Using Hydrophilic Adhesive Tape for Collection of Evidence for Forensic DNA Analysis*, 48 J. Forensic Sci. 1318 (Nov. 2003).

information gathered pursuant to the law. *Id.* at 601; *see also NASA v. Nelson*, 131 S.Ct. 746, 761-62 (2011) (laws and regulations limiting public disclosure of private data sufficient to protect against fears of improper dissemination).

Similarly, in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), this Court dismissed concerns regarding the potentially private information gathered from a medical analysis. There, the test in question was urinalysis to look for evidence of illegal drug use in student athletes. This Court found that there was no Fourth Amendment violation where the school was only seeking evidence of drug use, and was not using the urine samples to gather other, unrelated information. *Id.* at 658-60.

When the Court of Appeals expressed concern about the disclosure of the "vast genetic treasure map" of the human genome (JA 143), it was ignoring the law as written. What is at issue in this case is not a search of King's "genes," but rather a search for his identity. The means by which his identity was ascertained was the forensic analysis of certain non-coding alleles on his DNA. Those alleles are not "genes"—they do not instruct cells to create proteins, and they do not translate to any phenotypical trait. *See* Sara H. Katsanis and Jennifer K. Wagner, *Characterization of the Standard and Recommended CODIS Markers*, __ J. Forensic Sci. __ (Aug. 24, 2012) (concluding that loci used for forensic identification do not convey any sensitive or bio-medically relevant information) (advance online copy available at, http://onlinelibrary.wiley.com/doi/10.1111/j.1556-4029.2012.02253.x/abstract) (last visited Dec. 20, 2012). The privacy interest

at stake in this case is only in King's identity, as expressed by a short and essentially random sequence of numbers engraved upon every living cell.

Thus, any analysis of the information taken under the DNA Collection Act must be limited to what is actually taken under the statute, and not what other potential, illegal uses could be made of the swabs. Under the Act, the only information that may be collected and stored goes to identity, Md. Code Ann., Pub. Safety § 2-505(b), and any other use of the swabs is an incarcerable offense. *Id.* § 2-512. The State's crime laboratory, moreover, must comply with both the FBI's standards and the standards promulgated by the Maryland Secretary of the State Police. *Id.* § 2-503. These regulations similarly limit the information extracted from arrestee samples to a standard set of non-coding alleles, from which the State learns nothing aside from the gender of the individual and 13 pairs of numbers which, on their own, signify nothing. *See* FBI Laboratory Services, *CODIS and NDIS Fact Sheet*, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet (last viewed Dec. 18, 2012) (listing accepted 13 loci). The string of numbers is useful for forensic purposes not because of any innate informational content, but solely because it is unique to that individual.

2. *People arrested for violent crimes have reduced expectations of privacy generally, and no legitimate expectation of anonymity specifically.*

In *Samson*, this Court discussed a "continuum" of privacy expectations, noting that parolees had a

greater expectation of privacy than those incarcerated, but a lesser expectation of privacy than probationers, with incarceration implicitly marking the nadir of privacy expectations. 547 U.S. at 850. At least initially, people arrested for violent crimes are incarcerated. It may be for a few hours until they make bond, or it may be until trial, but they are wholly in the custody of the State, far beyond the relatively remote level of supervision afforded to parolees and probationers.

Lawful arrest fundamentally changes the nature of the individual's physical relationship to the State, and correspondingly diminishes the individual's reasonable expectation of privacy. *See, e.g., United States v. Robinson*, 414 U.S. 218, 235 (1973) ("A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification."); *see also Illinois v. Lafayette*, 462 U.S. 640, 648 (1983) (routine search of items taken from arrestees reasonable without warrant); *United States v. Edwards*, 415 U.S. 800, 808 (1974) (no warrant required for search and laboratory analysis of suspect's clothes seized during booking).[4] The key limiting principle is that the arrest be lawful, and not simply a subterfuge for collecting the

---

[4] In his concurrence in *Robinson*, Justice Powell was unequivocal: "[A] valid arrest justifies a full search of the person, even if that search is not narrowly limited by the twin rationales of seizing evidence and disarming the arrestee. The search incident to arrest is reasonable under the Fourth Amendment because the privacy interest protected by that constitutional guarantee is legitimately abated by the fact of arrest." 414 U.S. at 237-238 (Powell, J., concurring).

identifying information. *See Davis v. Mississippi*, 394 U.S. 721, 727 (1969).[5]

Not only does arrest mark a general reduction in an individual's expectation of privacy, but it eliminates entirely any expectation of anonymity. An arrestee might hope that his identity, and thus his participation in other crimes, goes undiscovered by the State. But "the mere expectation, however well justified, that certain facts will not come to the attention of the authorities" is not a privacy interest "that society is prepared to recognize as reasonable." *United States v. Jacobsen*, 466 U.S. 109, 122 (1984).

This Court has already ruled that there is no Fourth Amendment right to anonymity after being lawfully stopped by the police. In *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177 (2004), this Court upheld a Nevada law requiring people detained by the police to identify themselves. "[I]nterrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." *Id.* at 185 (quoting *INS v. Delgado*, 466 U.S. 210, 216 (1984)). Indeed, even absent a Fourth Amendment seizure, a person has no right to refuse to disclose identifying physical traits

---

[5] The Maryland statute applies even greater limits. The buccal swab is not analyzed until after arraignment, the sample and test results are automatically expunged if no convictions arise from the arrest, and a statutory exclusionary rule bars the use of any samples after the expungement date. Md. Code Ann., Pub. Safety §§ 2-504(d), 2-511. These specific statutory restrictions are not necessarily determinative of the constitutionality of the statute, but they reflect the Maryland General Assembly's efforts at crafting a balanced, reasonable approach.

such as voice, *United States v. Dionisio*, 410 U.S. 1, 12-14 (1973); handwriting, *United States v. Mara*, 410 U.S. 19, 21 (1973); or hair samples, *In re Grand Jury Proceedings (Mills)*, 686 F.2d 135, 139 (3d Cir. 1982), *cert. denied*, 459 U.S. 1020 (1982). An arrestee certainly does not have a broader right to withhold proof of his identity than a grand jury witness. *Kelly*, 55 F.2d at 70 (no right to withhold fingerprints after arrest); *Downs*, 111 Md. at 64, 73 A. at 656 (no right to withhold Bertillon measurements after arrest).

If there is no right to anonymity for a citizen briefly detained on the street by an investigating officer or subpoenaed by a grand jury, certainly no right belongs to a person lawfully arrested for the type of violent or other serious crimes contemplated by the DNA Collection Act. In short, a person who is arrested for a violent crime has no right to withhold his identity from the police, and under the statute, the only information being analyzed by the State goes to the arrestee's identity. Whether that identifying information is a photograph, series of whorls and ridges on a fingerprint, or the string of numbers resulting from a DNA profile, the collection of that information as a part of routine booking procedures is reasonable. Because the Act limits the search at issue to identifying information only, it is of a kind with well-established booking procedures such as fingerprinting and photographing.[6]

---

[6] In an observation that could just as easily apply to the transition from fingerprints to DNA profiles, one commentator noted that the change from Bertillonage to fingerprints was in part "because people often left their prints, but never their

(continued...)

3. The presumption of innocence does not buoy an arrestee's privacy interest.

Virtually every State to have considered the question has upheld the collection of identifying DNA information from convicted offenders, including Maryland. *State v. Raines*, 383 Md. 1, 857 A.2d 19 (2004). From a Fourth Amendment standpoint, there is little distinction between someone incarcerated pending trial and someone incarcerated following a conviction. Both have a diminished expectation of privacy based on their physical and legal relationship to the State.

Indeed, the "continuum" discussed in *Knights* and *Samson* describes a range of physical relationships to the State, not an abstract continuum of pre- and post-trial legal rights. *Samson*, 547 U.S. at 850. The Court of Appeals of Maryland mistook this continuum for the latter, leading it to distinguish arrestees from convicted offenders on the basis of the presumption of innocence, the only differentiating legal right the court could divine. (JA 141).

This was error. The presumption of innocence is part of the trial right to due process. It is irrelevant to the Fourth Amendment right to be free from unreasonable searches and seizures prior to trial. In *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court explicitly held that the presumption of innocence "has

---

[8](...continued)
Bertillon measurements, at crime scenes." Michael J. Saks, *Merlin & Solomon: Lessons from the Law's Formative Encounters with Forensic Identification Science*, 49 Hastings L.J. 1069, 1084 (1998).

no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." *Id.* at 533; *see also United States v. Dillard*, 214 F.3d 88, 102 (2d Cir. 2000) (rejecting application of presumption of innocence to pretrial bail determinations), *cert. denied*, 532 U.S. 907 (2001); *United States v. Koskotas*, 888 F.2d 254, 257 (2d Cir. 1989) (noting that presumption of innocence "has no bearing on pre-trial issues"); *In re Forfeiture Hearing*, 837 F.2d 637, 643 (4th Cir. 1988) (en banc) (presumption of innocence "is not a grant of immunity from pre-trial inconvenience" and does not apply to pretrial "interfer[ence] with liberty or property," including property forfeiture). Absent the erroneous reliance on this doctrine, however, the primary distinction between this case and the convicted-offender cases disappears.

B. The search authorized by the DNA Collection Act greatly advances important governmental interests.

Turning to the other side of the scale, the minimal intrusion occasioned by the DNA Collection Act is justified by several important governmental interests.

1. *DNA profiles of arrestees serve the same goals of unparalleled accuracy in identification as DNA profiles of convicted offenders.*

The 2008 extension of the Act to arrestees advances the State's interest in accurately identifying people in its custody. King, like many people charged with

crimes of violence, remained in state custody pending trial. The State clearly has an interest in knowing the identities of the people in its custody. Because of its "unparalleled" accuracy, DNA analysis "has the potential to significantly improve both the criminal justice system and police investigative practices." *Dist. Attorney's Office v. Osborne*, 557 U.S. 52, 55 (2009). It is the gold standard of forensic identification, and thus the State has an interest in making DNA identification a part of its post-arrest identification process.

Not only is DNA analysis the best means of identification, it is immutable. King could give a false name; he could even change his appearance. But what King could not do is change the 26-number sequence derived from his DNA. *Jones v. Murray*, 962 F.2d 302, 307 (4th Cir. 1992) ("Even a suspect with altered physical features cannot escape the match that his DNA might make with a sample contained in a DNA bank, or left at the scene of a crime within samples of blood, skin, semen or hair follicles."). For this reason, the "governmental justification for this form of identification . . . relies on no argument different in kind from that traditionally advanced for taking fingerprints and photographs, but with additional force because of the potentially greater precision of DNA sampling and matching methods." *Id.*

By authorizing DNA collection at the time of arrest, the DNA Collection Act also advances the State's interest in supervision of pretrial detainees, which is not significantly different than its interest in the supervision of convicted offenders. By accurately identifying arrestees, the State learns who may be suspects in other unrelated crimes, and who among

them should be charged under recidivist statutes. The State needs to reliably identify those in its custody in order to set bail, make decisions on institutional security for those not released, and set the terms and conditions of community supervision for those who are released. Accurate identification aids the State in the event that an arrestee escapes prior to trial, or if someone in its custody is wanted in another jurisdiction.

What is more, the State needs to acquire this information in a way that is most useful to its central missions of solving crimes and administering justice. Because the identifying information recovered from crime scenes is not always in the form of fingerprints, or photographs, or a suspect's name and date of birth, experience has shown that the State's interests are best served in gathering identifying information in a variety of formats—including DNA profiles.

2. *The State has an interest in solving crimes as expeditiously as possible.*

Additionally, of course, the State has an interest in solving crimes. Section 2-505 of the Act, enacted before the extension of the law to arrestees, includes "official investigation into a crime" as one of the enumerated purposes of creating the DNA database. By collecting DNA profiles at the time of arrest, law enforcement may narrow its field of suspects and save investigative resources. It can solve crimes faster, it can identify suspects with greater accuracy, and it can reduce the risk of setting a dangerous criminal free due to its failure to identify him as such.

To that end, the more profiles in the comparative DNA database, the more useful the database in identifying suspects. In 2002, the Maryland General Assembly made a reasoned choice to limit the collection of DNA to those convicted of felonies. Md. Code Ann., Pub. Safety § 2-504(a). In 2008, the General Assembly determined that the State's interests in a robust database would be better served by including the DNA profiles of people charged with crimes of violence, subject to certain safeguards and restrictions.

This, too, was a reasonable legislative choice. As Amicus Curiae DNA Saves said in its brief in support of the certiorari petition in this case, 70 percent of America's crime is committed by only six percent of its criminals. James E. Hooper, *Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act*, 89 Mich. L. Rev. 1951, 1951 n.3 (1991). As a class, arrestees are far more likely than the general public to be recidivists. Approximately 77 percent of arrestees have prior arrests, 69 percent have multiple prior arrests and 61 percent have at least one prior felony conviction. U.S. Dep't of Justice, Bureau of Justice Statistics, *Violent Felons In Large Urban Counties* at 4, 5 (2006).

The General Assembly's decision to expand the Act to arrestees was balanced by the limits it imposed upon the State. The law restricts the State to accessing only identifying information and imposes clear limits on the collection, retention, and use of that information. At the same time it allows the State to gather identifying information in a forensically useful format from a group of people who have already, by

virtue of arrest, relinquished any right of privacy in their identities.

The facts of this case dramatically underscore the value of expanding the database to include arrestees charged with violent crimes. It is undisputed that in 2003, King broke into the home of Vonette W. and raped her at gunpoint. He did not leave behind his photograph, his fingerprints, or his name—but he did leave his identity nonetheless, in the form of a string of numbers engraved upon every cell. When he was arrested in 2009, it was for a different violent crime, first-degree assault. He was ultimately convicted of second-degree assault, which is not a felony, and therefore his DNA would never have been taken by the State under the original version of the DNA Collection Act. It was only due to the expansion of the Act to cover those charged with violent crimes that King was linked to the rape of Vonette W. and ultimately convicted. The DNA Collection Act reasonably advances a legitimate state interest and makes no intrusion on any cognizable privacy right of an arrestee. It does not violate the Fourth Amendment.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals of Maryland should be reversed and the constitutionality of the Act affirmed.

Respectfully submitted,

Douglas F. Gansler
Attorney General of Maryland

Katherine Winfree
Chief Deputy Attorney General

Brian S. Kleinbord *
Robert Taylor, Jr.
Assistant Attorneys General

Office of the Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6435
bkleinbord@oag.state.md.us

Counsel for Petitioner

*Counsel of Record
December 26, 2012

map' that is incidentally made available by DNA collection" (JA 160), the dissenters further stated that they "could not disagree more" with the majority's rejection of the analogy to fingerprints.

The Chief Justice, in his capacity as the Fourth Circuit Justice, granted a stay of the Court of Appeals' decision. (JA 168). This Court granted the State of Maryland's subsequent petition for a writ of certiorari on November 9, 2012.

SUMMARY OF ARGUMENT

For centuries, public safety agencies have devised increasingly accurate techniques to identify individuals in their custody. These agencies have sought to collect and share identifying information in a standardized format to discover recidivists and solve crimes. Thus, in the late nineteenth century, the Bertillon system emerged; in the early twentieth century, forensic fingerprinting rose to preeminence. American courts have universally upheld these identification techniques against constitutional challenge. *See, e.g., United States v. Kelly*, 55 F.2d 67 (2d Cir. 1932) (fingerprinting); *Downs v. Swan*, 111 Md. 53, 73 A. 653 (1909) (Bertillon system). DNA identification is simply the most recent of these techniques, the Fourth Amendment legitimacy of which has never been seriously doubted.

The Fourth Amendment protects people against unreasonable searches and seizures. The arrestee provisions of the DNA Collection Act authorize a constitutionally reasonable search under a totality of the circumstances analysis, in which this Court weighs

the degree of intrusion upon the privacy interest at stake against the degree to which the search furthers legitimate governmental interests. *Samson*, 547 U.S. at 848; *Knights*, 534 U.S. at 118-19.

On one side of the scale, the degree of intrusion is minimal. The DNA is taken by a buccal swab—a quick and painless rubbing of the cheek. The Act allows for the production of only a very limited amount of strictly identifying information from that swab. Arrestees have a reduced expectation of privacy generally, and when it comes to identity specifically, no legitimate expectation of privacy. The loss of liberty that flows from a finding of probable cause necessarily entails a loss of privacy in one's identity. Once lawfully in police custody, "the 'booking' of an arrestee, which for one thing confirms the person's identity, does not violate the Fourth Amendment." *Doe v. Sheriff of DuPage County*, 128 F.3d 586, 588 (7th Cir. 1997).

Additionally, from a Fourth Amendment perspective, the physical restrictions imposed upon an arrestee leave an arrestee situated similarly to a convicted offender in prison. And, contrary to the Court of Appeals' ruling, the presumption of innocence does not alter an arrestee's privacy interest. The presumption of innocence is a trial right that does nothing to change the restrictive conditions of pretrial custody that diminish an arrestee's expectation of privacy.

On the other side of the scale, the State's interests are significant. First, the State needs to accurately identify the people it has lawfully taken into custody, and DNA collection from arrestees serves the same

goals of unparalleled accuracy in identification as does DNA collection from convicted offenders. Second, by authorizing DNA collection at the time of arrest, the Act advances the State's interest in the supervision of pretrial detainees, which is not significantly different than its interest in the supervision of convicted offenders. Third, to the extent that DNA profiling leads to more efficient criminal investigations and prosecutions by accurately identifying a suspect, sampling arrestees advances the State's interest in acquiring this information when it can do the most good. Lastly, it is legitimate for the State to enact reasonable policies that enhance the efficacy of comparative DNA databases for solving crimes. By testing arrestees, the State expands the database in a reasonably targeted fashion, avoids squandering investigational resources, spares innocent persons from becoming mistaken suspects, and prevents additional crimes that might otherwise occur.

Further, the DNA Collection Act contains various safeguards that ensure the reasonableness of the search. It limits the discretion of individual police officers by mandating collection from those arrested for enumerated crimes. The Act criminalizes the misuse of samples, including improper testing. The Act does not allow for information to be retrieved from the samples until after the arrestee has been arraigned. And, finally, the Act contains an automatic expungement provision for an arrestee who is later cleared of all charges. For all these reasons the Court should conclude that the DNA Collection Act's arrestee provisions authorize a reasonable search under the Fourth Amendment.

ARGUMENT

THE COLLECTION OF IDENTIFYING DNA INFORMATION AFTER A LAWFUL ARREST IS REASONABLE.

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The touchstone of the Fourth Amendment is always "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)).

Reasonableness must be appraised in light of the circumstances surrounding the search. *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985). The test for reasonableness involves balancing two interests: "the degree to which [the search] intrudes upon an individual's privacy" and "the degree to which [the search] is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999); *see also Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 536-37 (1967) ("there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails").

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

Supreme Court U.S.
FILED
JAN 25 2013
OFFICE OF THE CLERK

No. 12-207

In the Supreme Court of the United States

STATE OF MARYLAND, PETITIONER

v.

ALONZO JAY KING, JR.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR THE RESPONDENT

PAUL B. DEWOLFE
Public Defender
STEPHEN B. MERCER
Chief Attorney,
Forensics Division
OFFICE OF THE PUBLIC
DEFENDER
6 Saint Paul Street,
Suite 1400
Baltimore, MD 21202

KANNON K. SHANMUGAM
Counsel of Record
JAMES M. MCDONALD
KRISTIN A. FEELEY
DAVID M. HORNIAK
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

Library of Congress
Law Library

QUESTION PRESENTED

Whether the Fourth Amendment permits the warrantless collection and analysis of DNA from a person who has been arrested for, but not convicted of, a criminal offense, solely for use in investigating other offenses for which there is no individualized suspicion.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Constitutional provision involved 2
Statement 2
A. Background 3
B. Procedural history 9
Summary of argument 13
Argument 18
The warrantless, suspicionless collection and analysis of respondent's DNA violated the Fourth Amendment 18
A. The collection and analysis of respondent's DNA violated the Fourth Amendment because it involved a search that was not authorized by a warrant or based on some level of individualized suspicion 18
1. The collection and analysis of respondent's DNA by means of a cheek swab constituted a Fourth Amendment 'search' 18
2. The Fourth Amendment requires a warrant and probable cause or, at a minimum, some level of individualized suspicion 19
B. None of the established exceptions permitting warrantless, suspicionless searches applies here 22
1. The exception for searches of parolees is inapplicable because arrestees maintain reasonable expectations of privacy until conviction 23

Page

Table of contents—continued:

2. The 'special needs' exception is inapplicable because the primary purpose of the Maryland Act is to serve the ordinary law enforcement interest in crime control 27
3. The search-incident-to-arrest exception is inapplicable for multiple reasons 33
C. For Fourth Amendment purposes, DNA testing is not analogous to fingerprinting 34
D. There is no valid justification for creating a new exception permitting the warrantless, suspicionless search at issue here 38
E. Should this Court evaluate the warrantless, suspicionless search at issue here by balancing interests, respondent's privacy interests outweigh the government's interests 45
Conclusion 54
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Arizona v. *Gant*, 556 U.S. 332 (2009) ..... *passim*
Arizona v. *Hicks*, 480 U.S. 321 (1987) 40
Atwater v. *City of Lago Vista*, 532 U.S. 318 (2001) 50
Bailey v. *United States*, No. 11-770 (argued Nov. 1, 2012) 44
Bell v. *Wolfish*, 441 U.S. 520 (1979) 26
Bendix Autolite Corp. v. *Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988) 39
Boling v. *Romer*, 101 F.3d 1336 (10th Cir. 1996) 5
Boyd v. *United States*, 116 U.S. 616 (1886) 24
Carroll v. *United States*, 267 U.S. 132 (1925) 22

Page

Cases—continued:

Chandler v. *Miller*, 520 U.S. 305 (1997) ..... *passim*
Chimel v. *California*, 395 U.S. 752 (1969) 22, 25
City of Indianapolis v. *Edmond*,
531 U.S. 32 (2000) ..... *passim*
Davis v. *Mississippi*, 394 U.S. 721 (1969) 35
District Attorney's Office for Third Judicial
District v. *Osborne*, 557 U.S. 52 (2009) 30, 41, 42
Ferguson v. *City of Charleston*,
532 U.S. 67 (2001) ..... *passim*
Florence v. *Board of Chosen Freeholders*,
132 S. Ct. 1510 (2012) 26
Griffin v. *Wisconsin*, 483 U.S. 868 (1987) 24, 28
Henry v. *United States*, 361 U.S. 98 (1959) 22
Hudson v. *Palmer*, 468 U.S. 517 (1984) 24
Illinois v. *Gates*, 462 U.S. 213 (1983) 21
Katz v. *United States*, 389 U.S. 347 (1967) 20
McDaniel v. *Brown*, 130 S. Ct. 665 (2010) 42
McKune v. *Lile*, 536 U.S. 24 (2002) 24
Missouri v. *McNeely*, No. 11-1425
(argued Jan. 9, 2013) 26, 34
NASA v. *Nelson*, 131 S. Ct. 746 (2011) 48
New Jersey v. *T.L.O.*, 469 U.S. 325 (1985) 29
North Carolina v. *Alford*, 400 U.S. 25 (1970) 9
Olmstead v. *United States*, 277 U.S. 438 (1928) 41
Samson v. *California*, 547 U.S. 843 (2006) 23, 24, 27, 39
Schmerber v. *California*, 384 U.S. 757 (1966) ..... *passim*
Shipley v. *California*, 395 U.S. 818 (1969) 33
Skinner v. *Railway Labor Executives' Association*,
489 U.S. 602 (1989) 19
Terry v. *Ohio*, 392 U.S. 1 (1968) 21
Thornton v. *United States*, 541 U.S. 615 (2004) 25
Tolentino v. *New York*,
131 S. Ct. 1387 (2011) 35, 36, 38, 46

Page

Cases—continued:

United States v. *Kincade*,
379 F.3d 813 (9th Cir. 2004),
cert. denied, 544 U.S. 924 (2005) ..... *passim*
United States v. *Knights*, 534 U.S. 112 (2001) 21, 24
United States v. *Robinson*, 414 U.S. 218 (1973) 25, 50
United States v. *Scott*, 450 F.3d 863 (9th Cir. 2006) 26
United States v. *Stevens*, 130 S. Ct. 1577 (2010) 48
United States v. *United States District Court*,
407 U.S. 297 (1972) 20, 39
Vernonia School District 47J v. *Acton*,
515 U.S. 646 (1995) 22, 29, 42
Whalen v. *Roe*, 429 U.S. 589 (1977) 48

Constitution, statutes, and regulations:

U.S. Const. Amend. I 48
U.S. Const. Amend. IV ..... *passim*
Adam Walsh Child Protection and Safety Act of 2006,
Pub. L. No. 109-248, § 155, 120 Stat. 611 (codified
as amended at 42 U.S.C. 14135a(a)(1)(A)) 6
Debbie Smith Justice for All Act of 2004, Pub. L. No.
108-405, § 203, 118 Stat. 2269-2271 (codified as
amended at 42 U.S.C. 14135a(d)) 5, 6
DNA Analysis Backlog Elimination Act of 2000,
Pub. L. No. 106-546, § 3(a)(1)-(2), 114 Stat. 2728
(codified as amended at 42 U.S.C. 14135a(a)(1)-(2)) 5
DNA Fingerprint Act of 2005, Pub. L. No. 109-162,
119 Stat. 3084:
§ 1003, 119 Stat. 3085 6
§ 1004, 119 Stat. 3085-3086 6
Katie Sepich Enhanced DNA Collection Act of 2012,
§ 3, Pub. L. No. 112-253, 126 Stat. 2408 6
Violent Crime Control and Law Enforcement Act of
1994, Pub. L. No. 103-322, § 210304(a)(1)-(3), 108
Stat. 2069 (codified as amended at 42 U.S.C. 14132) 4
28 U.S.C. 1257(a) 1

Page

Statutes and regulations—continued:

Ala. Code § 36-18-25(c)(3) 6
Cal. Bus. & Prof. Code § 6054 52
Cal. Veh. Code § 12517.3(a)(1) 52
Cal. Welf. & Inst. Code § 10830(b)(1) 52
Conn. Gen. Stat. Ann. § 54-102g(a) 6
Maryland DNA Collection Act, Md. Code Ann.,
Pub. Safety §§ 2-501 to 2-514 7
Md. Code Ann., Pub. Safety § 2-501(e) 9, 43
Md. Code Ann., Pub. Safety § 2-502(d) 8
Md. Code Ann., Pub. Safety § 2-504(a)(3) 7, 27, 33, 36
Md. Code Ann., Pub. Safety § 2-504(b)(1) 8
Md. Code Ann., Pub. Safety § 2-504(d)(1) 8
Md. Code Ann., Pub. Safety § 2-505(a) 8, 28, 32, 47
Md. Code Ann., Pub. Safety § 2-505(b) 8
Md. Code Ann., Pub. Safety § 2-505(b)(1) 47
Md. Code Ann., Pub. Safety § 2-505(b)(2) 31
Md. Code Ann., Pub. Safety § 2-506(a) 8
Md. Code Ann., Pub. Safety § 2-506(b) 8, 9, 47
Md. Code Ann., Pub. Safety § 2-510 ..... 10, 47
Md. Code Ann., Pub. Safety § 2-511 ..... 8, 47
Md. Code Ann., Pub. Safety § 2-511(a)(1) 8, 26
Md. Code Ann., Pub. Safety § 2-511(c) 8, 26
Md. Code Ann., Corr. Servs. § 3-601(e) 31
1994 Md. Laws 458 7
1999 Md. Laws 490 7
2002 Md. Laws 465 7
2008 Md. Laws 337 7
Okla. Stat. Ann. tit. 74, § 150.27a 6
28 C.F.R. 28.12 ..... 6, 50
Md. Code Regs. 29.05.01.07(C) 31

Page

Miscellaneous:

John M. Butler, *Forensic DNA Typing: Biology, Technology, and Genetics of STR Markers* (2d ed. 2005) 3, 4, 5

Center for Genetics Education, *The Human Genetic Code—The Human Genome Project and Beyond* (2007) <tinyurl.com/cgegenome> 45

William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602-1791* (2009) 22

Department of Justice, Office of the Inspector General, *Follow-Up Review of the Status of IDENT/IAFIS Integration* (Dec. 2004) <tinyurl.com/iafisreview> 37

DNAResource.com, *State DNA Database Laws—Qualifying Offenses* (Sept. 2011) <tinyurl.com/statednalaws> 5

Itiel E. Dror & Greg Hampikian, *Subjectivity and Bias in Forensic DNA Mixture Interpretation*, 51 Sci. & Justice 204 (2011) 42

Jim Dwyer, *Whites Smoke Pot, But Blacks Are Arrested*, N.Y. Times, Dec. 23, 2009, at A24 43

Federal Bureau of Investigation, *CODIS Brochure* <tinyurl.com/codisbrochure> (last visited Jan. 25, 2013) 4, 7

Federal Bureau of Investigation, *Crime in the United States 2011—Persons Arrested* <tinyurl.com/2011arrests> (last visited Jan. 25, 2013) 51

Federal Bureau of Investigation, *Integrated Automated Fingerprint Identification System* <tinyurl.com/aboutiafis> (last visited Jan. 25, 2013) 37

Federal Bureau of Investigation, *Integrated Automated Fingerprint Identification System—Fact Sheet* <tinyurl.com/iafisfacts> (last visited Jan. 25, 2013) 37

Page

Miscellaneous—continued:

Federal Bureau of Investigation, *Integrated Automated Fingerprint Identification System—Five Key Services* <tinyurl.com/iafisservices> (last visited Jan. 25, 2013) 37
Federal Bureau of Investigation, *Planned Process and Timeline for Implementation of Additional CODIS Core Loci* <tinyurl.com/newloci> (last visited Jan. 25, 2013) 5
Erica Goode, *Many in U.S. Are Arrested by Age 23, Study Finds*, N.Y. Times, Dec. 19, 2011, at A16 51
Hearing on H.B. 370 Before the H. Comm. on the Judiciary, 2008 Leg., 425th Sess. (Md. Feb. 13, 2008) 52
Hearing on S.B. 211 Before the S. Comm. on Judicial Proceedings, 2008 Leg., 425th Sess. (Md. Feb. 13, 2008) 9, 28
Michelle Hibbert, *DNA Databanks: Law Enforcement's Greatest Surveillance Tool?*, 34 Wake Forest L. Rev. 767 (1999) 5
H.R. Rep. No. 711, 108th Cong., 2d Sess. (2004) 29
H.R. Rep. No. 900, 106th Cong., 2d Sess. (2000) 4, 29
Elizabeth E. Joh, *Reclaiming 'Abandoned' DNA: The Fourth Amendment and Genetic Privacy*, 100 Nw. U. L. Rev. 857 (2006) 47
Sara H. Katsanis & Jennifer K. Wagner, *Characterization of the Standard and Recommended CODIS Markers*, 58 J. Forensic Sci. S169 (2013) 46
Wayne A. Logan, *Policing Identity*, 92 B.U. L. Rev. 1561 (2012) 52
Brendan Maher, *The Human Encyclopedia*, 489 Nature 46 (2012) 46
Maryland State Police, Forensic Sciences Division, *2011 Annual Report: Statewide DNA Database Report* (Apr. 2012) <tinyurl.com/marylandreport> ... 49

Page

Miscellaneous—continued:

Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 Mich. L. Rev. 291 (2010).....37
Governor Martin O'Malley, Statement on the Supreme Court's Decision to Hear State's DNA Case (Nov. 9, 2012) <tinyurl.com/omalleydna> 29
Oxford English Dictionary (2d ed. 1989) 30
Jeffrey Rosen, *Genetic Surveillance For All?*, Slate (Mar. 17, 2009) <tinyurl.com/rosencodis> 7
Mark A. Rothstein & Meghan K. Talbott, *The Expanding Use of DNA in Law Enforcement: What Role for Privacy?*, 34 J.L. Med. & Ethics 153 (2006).....45
Julie Samuels et al., *Collecting DNA from Arrestees: Implementation Lessons*, Nat'l Inst. Just. J., June 2012, at 18 <tinyurl.com/samuelsdna> 6
William C. Thompson, *Forensic DNA Evidence: The Myth of Infallibility*, in *Genetic Explanations: Sense and Nonsense* 227 (Sheldon Krimsky & Jeremy Gruber, eds., 2012) 42

In the Supreme Court of the United States

No. 12-207

STATE OF MARYLAND, PETITIONER

v.

ALONZO JAY KING, JR.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Maryland Court of Appeals (J.A. 83-166) is reported at 42 A.3d 549. The court's order denying reconsideration and a stay of the mandate (Pet. App. 87b) is unreported.

JURISDICTION

The judgment of the Maryland Court of Appeals was entered on April 24, 2012. A motion for reconsideration was denied on May 18, 2012 (Pet. App. 87b). The petition for a writ of certiorari was filed on August 14, 2012, and granted on November 9, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Respondent was arrested in Wicomico County, Maryland, and charged in state court with first- and second-degree assault. The state then collected a sample of respondent's DNA pursuant to the Maryland DNA Collection Act, which requires the collection and analysis of DNA from persons who have been charged with certain criminal offenses. It is undisputed that the state conducted the DNA testing not to link respondent to the alleged assault, but rather to determine whether he was implicated in any other offenses.

Respondent's DNA profile was matched to a profile from forensic evidence of a previous sexual assault. Based solely on that match, respondent was charged with various offenses arising from the sexual assault, including first-degree rape. Respondent moved to suppress evidence of the DNA match. The trial court denied respondent's motion and later found respondent guilty of first-degree rape. The Maryland Court of Appeals reversed, holding that the warrantless, suspicionless collection and analysis of respondent's DNA violated the Fourth Amendment.

A. Background

1. DNA testing is a powerful law enforcement tool that raises profound privacy concerns. Deoxyribonucleic acid (DNA) is located in almost every cell of the human body; it contains all of the information that determines an individual's genetic makeup. As every schoolchild learns, a DNA molecule consists of two strands that are coiled together in a ladder-like double helix. Each strand consists of a series of four bases: A (adenine), C (cytosine), G (guanine), and T (thymine). The base on one strand forms a "rung" of the ladder with a corresponding base on the other strand: A always pairs with T, and C with G. The order in which the base pairs are arranged constitutes an individual's DNA sequence; variations in that sequence are what give rise to genetic differences. See John M. Butler, *Forensic DNA Typing: Biology, Technology, and Genetics of STR Markers* 17-19 (2d ed. 2005) (Butler).

In the 1980s, federal and state governments began to use DNA testing for law enforcement purposes. In particular, law enforcement agencies began to create DNA profiles for individuals suspected of committing crimes, which could be compared with profiles created from forensic evidence collected at crime scenes. In order to create a DNA profile, officers must first collect cells that contain DNA. Cells can be collected from an individual through a blood draw or a cheek swab; they can also be collected from bodily fluids, flakes of skin, or items such as a toothbrush, a coffee cup, or a cigarette butt. DNA is extracted from the cells to create a DNA sample; the sample is analyzed to gain information about the order of the base pairs, and that information is used to create a DNA profile. See Butler 7, 11, 34 & tables 3.1, 11.

Today, the most common method of creating a DNA profile is through short tandem repeat (STR) testing.

Much of an individual's DNA is found on chromosomes in the nuclei of cells; at certain positions on the chromosomes (known as "loci"), short sequences of base pairs repeat themselves. The number of times the sequence repeats at a particular locus, however, varies to some degree from person to person. In STR testing, the number of repeats is counted at several different loci; the resulting series of numbers constitutes the DNA profile. That profile can then be compared against other profiles in the hopes of producing a match. See Butler 7, 17, 20-27, 85-96.

2. In 1994, Congress authorized the Federal Bureau of Investigation (FBI) to establish a national database of DNA profiles taken from convicted individuals and from forensic evidence collected at crime scenes. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210304(a)(1)-(3), 108 Stat. 2069 (codified as amended at 42 U.S.C. 14132). Exercising that authority, the FBI created the Combined DNA Index System (CODIS), a coordinated system of federal, state, and local databases that allows participating law enforcement agencies to store DNA profiles and to search profiles stored by other agencies. See FBI, *CODIS Brochure* <tinyurl.com/codisbrochure> (last visited Jan. 25, 2013) (*CODIS Brochure*).

In the course of creating CODIS, the FBI devised a standard DNA profile consisting of data from 13 different loci. Those loci are found on "non-coding" regions of an individual's chromosomes: that is, regions that do not store information that is used to make proteins. The loci were selected in the belief that they did not correspond to any particular traits or characteristics. See H.R. Rep.

No. 900, 106th Cong., 2d Sess., Pt. I, at 27 (2000); Butler 22, 94, 443-444.[1]

By 1999, all 50 States required DNA collection and analysis from at least some convicted individuals. See Michelle Hibbert, *DNA Databanks: Law Enforcement's Greatest Surveillance Tool?*, 34 Wake Forest L. Rev. 767, 775 (1999).[2] In 2000, Congress followed suit and required DNA collection and analysis from individuals convicted of a limited set of federal offenses; in 2004, Congress extended that requirement to all individuals convicted of federal felonies. See DNA Analysis Backlog Elimination Act of 2000, Pub. L. No. 106-546, § 3(a)(1)-(2), 114 Stat. 2728 (codified as amended at 42 U.S.C. 14135a(a)(1)-(2)); Debbie Smith Justice for All Act of 2004, Pub. L. No. 108-405, § 203, 118 Stat. 2269-2271 (codified as amended at 42 U.S.C. 14135a(d)).

Then as now, courts consistently rejected claims by *convicted* individuals that the collection and analysis of their DNA violated the Fourth Amendment. See, *e.g.*, *United States* v. *Kincade*, 379 F.3d 813, 832 (9th Cir. 2004) (en banc), cert. denied, 544 U.S. 924 (2005); *Boling* v. *Romer*, 101 F.3d 1336, 1340 (10th Cir. 1996). Accordingly, some States began to test the boundaries of their authority by requiring DNA collection and analysis from individuals who had been arrested for, but not yet con-

---

[1] The FBI has announced plans to expand the number of loci included in the standard DNA profile, but has not yet done so. See FBI, *Planned Process and Timeline for Implementation of Additional CODIS Core Loci* <tinyurl.com/newloci> (last visited Jan. 25, 2013).

[2] All 50 States now require DNA collection and analysis from all individuals convicted of felonies. See DNAResource.com, *State DNA Database Laws—Qualifying Offenses* (Sept. 2011) <tinyurl.com/statednalaws>.

victed of, criminal offenses. In 2004, Congress expressly permitted the storage on CODIS of profiles of arrested individuals. See Pub. L. No. 108-405, § 203, 118 Stat. 2269-2271. In 2005 and 2006, Congress extended federal DNA testing to all arrestees. See DNA Fingerprint Act of 2005, Pub. L. No. 109-162, § 1004, 119 Stat. 3085-3086; Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 155, 120 Stat. 611 (codified as amended at 42 U.S.C. 14135a(a)(1)(A)); 28 C.F.R. 28.12.

The federal government has provided substantial funding to the States for DNA testing, thus creating a powerful incentive for States to create and expand their own programs. In 2006, the federal government expressly made funds available to the States for the creation of DNA profiles of arrested individuals; earlier this month, the President signed a law that provides funding for up to the entire first-year cost of implementing an arrestee testing program. See Pub. L. No. 109-162, § 1003, 119 Stat. 3085; Katie Sepich Enhanced DNA Collection Act of 2012, § 3, Pub. L. No. 112-253, 126 Stat. 2408. Like the federal government, 28 States now require DNA collection and analysis from at least some arrestees. See Julie Samuels et al., *Collecting DNA from Arrestees: Implementation Lessons*, Nat'l Inst. Just. J., June 2012, at 18, 19 <tinyurl.com/samuelsdna>.[3]

As federal and state DNA testing programs have expanded, the number of DNA profiles in CODIS has grown exponentially. In 2000, there were about 400,000

---

[3] Of those 28 States, three have idiosyncratic statutes: Alabama requires consent before testing, Ala. Code § 36-18-25(c)(3); Oklahoma collects DNA only from illegal-alien arrestees, Okla. Stat. Ann. tit. 74, § 150.27a; and Connecticut collects DNA only from arrestees with prior convictions who have not previously been tested, see Conn. Gen. Stat. Ann. § 54-102g(a).

offender profiles; by 2006, there were about 4 million offender profiles and 50,000 arrestee profiles. According to the most recent available data, CODIS now contains about 10 million offender profiles and 1.1 million arrestee profiles. Every Monday morning, the CODIS system automatically checks individual profiles against profiles created from forensic evidence collected at crime scenes, looking for matches. See *CODIS Brochure*; Jeffrey Rosen, *Genetic Surveillance for All?*, Slate (Mar. 17, 2009) <tinyurl.com/rosencodis>.

3. This case involves a constitutional challenge to an application of the Maryland DNA Collection Act (Maryland Act or Act), Md. Code Ann., Pub. Safety §§ 2-501 to 2-514. The evolution of the Maryland Act largely tracks that of federal law. In 1994, the Maryland General Assembly established a state database of DNA profiles and required DNA collection and analysis from individuals convicted of rape and other sexual offenses. See 1994 Md. Laws 458. In 1999 and 2002, the General Assembly expanded the Act to cover individuals convicted of all felonies and some misdemeanors. See 1999 Md. Laws 490; 2002 Md. Laws 465.

In 2008, the General Assembly temporarily expanded the Act to cover individuals who had been charged with, but not yet convicted of, crimes of violence and burglaries—including, as is relevant here, first-degree assault. Md. Code Ann., Pub. Safety § 2-504(a)(3); 2008 Md. Laws 337.[4] Under the Act, the collection of DNA samples from covered individuals is mandatory; with regard to individuals who have been charged but not convicted, the Act

---

[4] The expansion of the Act to arrestees is due to expire on December 31, 2013. A bill to extend the expansion is currently pending in the General Assembly, but has not yet passed.

provides that the state is to collect the sample at the time of the charge. Md. Code Ann., Pub. Safety § 2-504(b)(1).

The Act further provides that, "[t]o the extent fiscal resources are available," DNA samples "shall be * * * tested" for several purposes, including "as part of an official investigation into a crime"; "to analyze and type the genetic markers contained in or derived from the [sample]"; and "for research and administrative purposes," such as "develop[ing] a population data base after personal identifying information is removed" and "support[ing] identification research and protocol development of forensic DNA analysis methods." Md. Code Ann., Pub. Safety § 2-505(a). In aid of those purposes, the Act specifically authorizes the state to prepare and store "DNA records" (the Act's term for DNA profiles), which can be compared with similar profiles in national and state databases. *Id.* §§ 2-502(d), 2-504(d)(1), 2-505(b), 2-506(a).

As to individuals who have been charged and arraigned but not yet convicted, the Act authorizes the state to store both DNA samples and DNA profiles while charges remain pending. Md. Code Ann., Pub. Safety §§ 2-506(b), 2-511. If a charge results in a conviction, the DNA sample and DNA profile are retained indefinitely; if the charge does not result in a conviction (or the conviction is later overturned), the state is required to destroy the DNA sample and expunge the DNA profile from its database. *Id.* § 2-511(a)(1), (c).[5]

---

[5] Numerous groups, including the Maryland chapters of the NAACP and NOW, opposed the expansion of the Maryland Act to arrestees. The Maryland chapter of NOW testified that, while "it is important for women to be protected before an assault or a rape," the expansion would violate the Fourth Amendment and state resources would be better devoted to crime-prevention programs. See

B. Procedural History

1. On April 10, 2009, respondent was arrested in Wicomico County, Maryland, and charged in state court with first- and second-degree assault. Respondent was accused of pointing a shotgun at a group of individuals; after one of the individuals pointed out respondent to an officer, he was arrested. Respondent admitted his involvement in the incident and appears to have been immediately identified as Alonzo King. See App., 1a-6a, *infra* (officer's statement of probable cause from the night of the arrest).[6]

After respondent was arrested and charged, the state collected a sample of his DNA pursuant to the Act. The state did not contend below, and does not contend here, that it conducted the DNA analysis to link him to the alleged assault; instead, it did so to determine whether he was implicated in any other offenses. See J.A. 85-86, 149. State personnel collected the sample of respondent's DNA by means of a swab of the inside of his cheek. The Forensic Sciences Division of the Maryland State Police processed respondent's DNA sample; a private vendor then analyzed the sample and prepared a DNA profile, which was subsequently stored in the state database. On August 4, 2009—almost four months after respondent's

---

Hearing on S.B. 211 Before the S. Comm. on Judicial Proceedings, 2008 Leg., 425th Sess. (Md. Feb. 13, 2008) (statement of Maryland NOW).

[6] The charge of first-degree assault was later dropped; after respondent entered a plea pursuant to *North Carolina* v. *Alford*, 400 U.S. 25 (1970), he was convicted of second-degree assault, a misdemeanor offense. J.A. 86 & n.3. An individual who is convicted of second-degree assault is not subject to DNA testing under the Act. See Md. Code Ann., Pub. Safety § 2-501(e).

initial arrest and charge—respondent's DNA profile was matched to a profile from forensic evidence of a 2003 sexual assault in Wicomico County. J.A. 86-88.

2. Based solely on that match, the state sought, and a Wicomico County grand jury returned, an indictment charging respondent with various offenses arising from the sexual assault, including first-degree rape. Because the Act provides that a match "may be used only as probable cause and is not admissible at trial," Md. Code Ann., Pub. Safety § 2-510, the state obtained a search warrant and collected a second DNA sample, which also produced a match. J.A. 89.

Respondent moved to suppress evidence of the DNA match, arguing, as is relevant here, that the initial collection and analysis of his DNA violated the Fourth Amendment. J.A. 89-90. The trial court denied the motion. J.A. 47-55, 82. The court later found respondent guilty of first-degree rape and sentenced him to life imprisonment without the possibility of parole. J.A. 92.

3. The Maryland Court of Appeals reversed. J.A. 83-166.

a. The Maryland Court of Appeals first reasoned that, under the Fourth Amendment, "[a] seizure or search will be upheld even if there is a reasonable expectation of privacy when the government has a 'special need.'" J.A. 96. The court noted, however, that the state had "do[ne] little more than mention the special needs exception in the present case." *Ibid.* That was "for good reason," according to the court, because the "narrow confines" of that doctrine "do not embrace the case at bar." *Ibid.*

The court proceeded to determine that respondent's privacy interests outweighed the government's interests in collecting and analyzing respondent's DNA. J.A. 96-152. At the outset, the court stated that "[o]ur analysis is

influenced * * * by the precept that the government must overcome a presumption that warrantless, suspicionless searches are per se unreasonable." J.A. 140.

First addressing respondent's privacy interests, the court noted that "[respondent], as an arrestee, had an expectation of privacy to be free from warrantless searches of his biological material and all of the information contained within that material." J.A. 142. The court observed that "DNA samples contain a massive amount of deeply personal information." J.A. 141 (internal quotation marks and citation omitted). The court then concluded that, to the extent the Act imposed restrictions on the use of the DNA sample, that fact "does not change the nature of the search." J.A. 142. The court explained that "upholding the statute simply because of restrictions on the use of the material would be analogous to allowing the government to seize private medical records without a warrant, but restrict their use only to the portion of the records that serve to identify the patient." *Ibid.*

The court refused to "embrace wholly" the analogy between taking DNA samples and fingerprinting advanced by the state. J.A. 142. The court noted that the collection of respondent's DNA involved a physical intrusion, albeit a "minimal" one. J.A. 143. Further, the court observed, "[t]he information derived from a fingerprint is related only to physical characteristics and can be used to identify a person, but no more." *Ibid.*

In determining that respondent's privacy interests were substantial, the court described the distinction between convicted and arrested individuals as "critical to our analysis." J.A. 144. The court reasoned that, "[a]lthough arrestees do not have all the expectations of privacy enjoyed by the general public, the presumption of

innocence bestows on them greater protections than convicted felons, parolees, or probationers." *Ibid.*

Turning to the state's interests, the court reasoned that, because respondent had already been "accurately" identified by the time his DNA sample was analyzed several months after his arrest, "the only [s]tate interest served by the collection of his DNA" was "[s]olving cold cases." J.A. 147, 148. Although the court recognized that interest as a legitimate one, it determined that "a warrantless, suspicionless search cannot be upheld by a 'generalized interest' in solving crimes." J.A. 147.

In analyzing the state's interests, the court emphasized that "DNA collection can wait until a person has been convicted, thus avoiding all of the threats to privacy discussed in this opinion." J.A. 149. The court added that, in many cases in which DNA-related evidence is required for conviction, "there will be * * * substantial other evidence to provide probable cause for a search warrant" for that evidence. *Ibid.*

b. Judge Barbera, joined by Judge Wilner, dissented. J.A. 154-166. She concluded that the majority had "overinflat[ed] an arrestee's interest in privacy and underestimat[ed] the [s]tate's interest in collecting arrestee DNA." J.A. 154. As to respondent's privacy interests, Judge Barbera asserted that "[respondent's] privacy expectation at the time of the cheek swab was far more like a convicted felon, probationer, and parolee than an uncharged individual." J.A. 157. As to the government's interests, Judge Barbera contended that "law enforcement's interest in identity extends to knowing whether a person has been involved in crime." J.A. 165.

4. Citing a conflict among the lower courts on the constitutionality of DNA testing of arrestees, the Chief Justice granted a stay of the judgment. J.A. 168-171. This Court subsequently granted review.

SUMMARY OF ARGUMENT

This case presents the question whether the Court should develop an exception to established Fourth Amendment rules for a new technology. It should not. This Court has never upheld a blanket, warrantless search of the type at issue here, where the search is being conducted to investigate crimes for which there is no individualized suspicion. The mere fact that DNA testing represents a valuable additional tool for law enforcement provides no justification for distorting the Court's existing Fourth Amendment jurisprudence. The Maryland Court of Appeals correctly held that the warrantless, suspicionless collection and analysis of respondent's DNA was invalid.

A. The collection and analysis of respondent's DNA violated the Fourth Amendment for the simple reason that it was not authorized by a warrant or based on some level of individualized suspicion. It is undisputed that a search occurred when the state collected and analyzed respondent's DNA by means of a swab of his cheek. A search, in turn, triggers the default Fourth Amendment requirements of a warrant and probable cause. Here, the state failed to obtain a warrant. And it has also failed to establish probable cause, because it has offered no reason to believe that DNA analysis would have been useful in linking respondent to the assault for which he was arrested, nor has it contended that it possessed probable cause with regard to respondent's involvement in the sexual assault for which he was later charged (or any other offense). Although the Court has relaxed the warrant requirement and required only reasonable suspicion in certain specific contexts, the state has failed even to establish reasonable suspicion here, because it did not possess *any* level of individualized suspicion that would have justified the search of respondent.

B. This Court has only rarely created exceptions to the requirements of a warrant or individualized suspicion, and none of the existing exceptions is applicable here. The exception for searches of parolees does not apply because arrestees are not subject to the same across-the-board curtailment of their expectations of privacy. It is the fact of *conviction* that works such a curtailment for parolees. Although an arrest entails an obvious limitation on an individual's liberty, it does not permit the government to dispense with the ordinary rules governing searches for investigative purposes. And where, as here, the government wishes to conduct an investigative search to link an arrestee to other offenses for which there is no individualized suspicion, an arrestee, like an ordinary citizen, retains the full protections of the Fourth Amendment.

The "special needs" doctrine is also inapposite here—as petitioner seemingly recognizes by failing explicitly to invoke it. As the name suggests, the "special needs" doctrine is triggered only upon a threshold showing of a "special need": that is, a showing that the primary purpose of the program at issue goes beyond the normal need for law enforcement. It cannot seriously be disputed that the primary purpose of the Maryland Act—like other DNA-testing statutes—is to serve the ordinary law enforcement interest in solving and preventing crimes. Law enforcement, moreover, plays a pervasive role in the operation of the Maryland DNA-testing program. Although petitioner and the United States contend that the DNA testing of arrestees also serves governmental interests in identifying individuals in custody and supervising arrestees before trial, there is no evidence that those interests were actual purposes behind the Maryland Act—or that the Act plays a meaningful role in serving those interests.

The search-incident-to-arrest doctrine likewise cannot justify the search in this case. Even assuming that the search was contemporaneous to the arrest (and that the search-incident-to-arrest doctrine permits physical intrusions into the body), the rationales for that doctrine are inapposite here. In particular, assuming that such a rationale applies outside the vehicle context, the collection of respondent's DNA could not be said to constitute the gathering of evidence relevant to the offense of arrest, because it is undisputed that the state did not conduct the search to link respondent to the alleged assault.

C. Petitioner and the United States contend that the warrantless, suspicionless collection and analysis of DNA from arrestees is analogous to fingerprinting. Neither of the two potential justifications for fingerprinting arrestees upon booking, however, applies to the collection and analysis of DNA. There is good reason to believe that fingerprinting does not give rise to a "search"; it does not involve an intrusion into the body, and it arguably does not violate any legitimate expectation of privacy. But even assuming that fingerprinting does give rise to a "search," it can be justified under the "special needs" doctrine, because the primary purpose of fingerprinting upon booking is to identify an individual who is being taken into the criminal-justice system, not to investigate unsolved offenses. Remarkably, the United States itself recently advanced both of those justifications for fingerprinting before this Court—and, in the process, distinguished DNA testing. The United States was just as right then as it is wrong now, and the analogy between fingerprinting and DNA testing should therefore be rejected.

D. There is no valid justification for creating a new exception to the presumptive warrant and individualized-suspicion requirements for DNA testing. Petitioner and

the United States contend that this Court can dispense with those requirements, and resort to balancing, where a search involves modest intrusions on an individual's privacy interests or where the government's interests are particularly strong. But the Court does not start by balancing an individual's privacy interests and the government's interests, and then apply the warrant and individualized-suspicion requirements only where those interests are roughly in equipoise. Quite the opposite. The Court starts with the warrant and individualized-suspicion requirements, and dispenses with them only where the government provides an articulable justification for doing so.

The mere fact that DNA testing represents an advance on preexisting technologies does not supply that justification. Nor does the fact that the statute at issue here requires DNA testing on a blanket basis. And while the United States complains that applying a warrant requirement in this context would thwart the government's interests, that is the whole point of the Fourth Amendment. Because the government cannot point to any justification for discarding the warrant requirement here, this Court should enforce that requirement and hold that the warrantless, suspicionless search of respondent was unconstitutional.

E. In the event this Court does resort to balancing, it should conclude, as the lower court did, that respondent's privacy interests outweigh the government's interests. As to respondent's privacy interests, the search at issue here involved a physical intrusion into the body. And even beyond that intrusion, the collection of an individual's DNA raises profound privacy concerns. The search at issue here allows the state to come into possession of the entirety of an individual's DNA. Nothing in the Maryland Act limits the state to using only the in-

formation contained in the standard CODIS profile; the Act permits the state to retain an individual's DNA sample even after a DNA profile has been prepared, and to conduct further tests on that sample for any one of a number of broad statutory purposes. And absent a special need, this Court has never blessed a search that would otherwise violate the Fourth Amendment simply because law enforcement has promised not to review the information it obtains from the search in a particular manner.

As to the government's interests, the government undoubtedly has a substantial interest in solving and preventing crimes. But petitioner has utterly failed to demonstrate that the expansion of the Maryland Act to arrestees is essential to serve that interest. In fact, the available statistics show that the collection and analysis of DNA from arrestees has resulted only in a modest number of charges and convictions—and those statistics do not even account for cases in which DNA collection and analysis would otherwise be permissible (either because the arrestee was later convicted, or because the arrestee's DNA was relevant to the crime of arrest).

The balancing analysis offered by petitioner and the United States would have no meaningful limiting principle. It would permit the DNA testing of all arrestees—which would result in a monumental expansion of DNA databases, in light of the fact that there are over 12 million arrests in the United States every year. But even worse, virtually all of the arguments advanced by petitioner and the United States would justify the blanket collection and retention of DNA from ordinary citizens. In the face of the profound privacy concerns raised by DNA testing, this Court should reject that open-ended approach, and hold that the collection and analysis of respondent's DNA was unconstitutional.

ARGUMENT

THE WARRANTLESS, SUSPICIONLESS COLLECTION AND ANALYSIS OF RESPONDENT'S DNA VIOLATED THE FOURTH AMENDMENT

The Fourth Amendment of the Constitution guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," and further provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Maryland Court of Appeals correctly held that the warrantless, suspicionless collection and analysis of respondent's DNA constituted an unreasonable search in violation of the Fourth Amendment.

A. The Collection And Analysis Of Respondent's DNA Violated The Fourth Amendment Because It Involved A Search That Was Not Authorized By A Warrant Or Based On Some Level Of Individualized Suspicion

1. The Collection And Analysis Of Respondent's DNA By Means Of A Cheek Swab Constituted A Fourth Amendment 'Search'

To begin with, there is no dispute that a search occurred when the state collected and analyzed respondent's DNA. See Pet. Br. 13 (noting that "[t]he search at issue in this case involves rubbing a small swab against the inside of an arrestee's cheek during booking"); U.S. Br. 14 (stating that "Maryland unquestionably searched respondent when it obtained his DNA sample and generated a DNA fingerprint").

That proposition is not only undisputed, but indisputable. At a minimum, the swab of respondent's cheek constitutes an intrusion into his person and thus gives

rise to a Fourth Amendment search. See, *e.g.*, *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989); *Schmerber* v. *California*, 384 U.S. 757, 767 (1966). Whatever the outer bounds on the concept of a search, therefore, this case falls within the heartland.[7] And the existence of a search triggers the protections of the Fourth Amendment.[8]

2. *The Fourth Amendment Requires A Warrant And Probable Cause Or, At A Minimum, Some Level Of Individualized Suspicion*

a. As petitioner and the United States note, the ultimate touchstone of Fourth Amendment analysis is the reasonableness of the government's conduct. Pet. Br. 11; U.S. Br. 11. It does not follow, however, that a court should analyze reasonableness by undertaking a case-by-

---

[7] Because there was unquestionably a search here by virtue of the swab of respondent's cheek, the Court need not reach the question whether the analysis of a DNA sample taken from cells collected in a non-intrusive manner, standing alone, would constitute a search—for example, where the state collects cells from a chair in which the suspect had been sitting. Under this Court's cases, however, the better view is that it would. As the Court has explained in discussing blood-alcohol testing, not only does the "physical intrusion [of collecting blood] * * * infringe[] an expectation of privacy that society is prepared to recognize as reasonable," but "[t]he ensuing chemical analysis of the sample to obtain physiological data is a *further invasion* of the tested employee's privacy interests." *Skinner*, 489 U.S. at 616 (emphasis added).

[8] To the extent that the collection of respondent's DNA "may be viewed as a meaningful interference with [respondent's] possessory interest in his [tissue]," it would also constitute a seizure for Fourth Amendment purposes. *Skinner*, 489 U.S. at 617 n.4. Ultimately, however, it is immaterial to the Fourth Amendment analysis whether the DNA collection and analysis here gave rise to both a search and a seizure. *Ibid.*

case balancing of the government's interests and an individual's privacy interests. To the contrary, the Court has articulated a number of familiar principles that flesh out the "reasonableness" standard.

Perhaps most familiar of all, when a search has occurred, "[the] analysis begins * * * with the basic rule that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *Arizona* v. *Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz* v. *United States*, 389 U.S. 347, 357 (1967)). That principle ensures that a neutral and detached magistrate will ordinarily pass on the existence of probable cause—a "time-tested means of effectuating Fourth Amendment rights" that "accords with our basic constitutional doctrine that individual freedoms will best be preserved through [the] separation of powers." *United States* v. *United States District Court*, 407 U.S. 297, 317, 318 (1972).

The default Fourth Amendment requirements of a warrant and probable cause apply with full force to searches, like the search here, that involve physical intrusions into the human body. Absent exigent circumstances, "[s]earch warrants are ordinarily required for searches of dwellings, and * * * no less could be required where intrusions into the human body are concerned." *Schmerber*, 384 U.S. at 770.

Petitioner fails even to acknowledge the principle that a search ordinarily requires a warrant and probable cause. But that principle disposes of this case. The state failed to obtain a warrant here, which was required because the search involved a physical intrusion into respondent's body. Even if some exception to the warrant requirement were applicable, the state has also failed to

establish the existence of probable cause: it has not offered any reason to believe that DNA analysis would have been useful in linking respondent to the assault for which he was arrested,[9] nor has it contended that it possessed probable cause with regard to respondent's involvement in the sexual assault for which he was later charged (or any other offense). And the state could not colorably claim that the collection and analysis of respondent's DNA was justified by exigent circumstances. For those reasons, the search in this case was unreasonable and thus violated the Fourth Amendment.

b. To be sure, the Court has relaxed the warrant requirement and required a lower level of individualized suspicion—reasonable suspicion—in certain specific contexts. Most notably, in *Terry* v. *Ohio*, 392 U.S. 1 (1968), the Court permitted a warrantless protective frisk of an individual based on reasonable suspicion that criminal activity was afoot. Similarly, in *United States* v. *Knights*, 534 U.S. 112 (2001), the Court permitted a warrantless search of a probationer's home based on reasonable suspicion, where the search was also authorized by a condition of probation.

Although petitioner and the United States cite this Court's reasonable-suspicion cases, they do not argue that the Court should require reasonable suspicion for the search at issue here. And for good reason: just as the state has failed to establish probable cause, so too has it failed to establish any level of individualized suspicion that would have justified the search of respondent.

---

[9] For a search, the requisite "probable cause" is not simply probable cause to believe that a crime has been committed, but probable cause to believe that the search would uncover evidence relevant to the crime. See, *e.g.*, *Illinois* v. *Gates*, 462 U.S. 213, 238 (1983).

Where, as here, the state collects an arrestee's DNA not to link him to the offense of arrest, but rather to determine his involvement in other offenses for which there is no individualized suspicion, the search is invalid. As we will explain in the remainder of this brief, there is no valid justification for dispensing with the presumptive warrant and individualized-suspicion requirements in the context of DNA testing.

B. None Of The Established Exceptions Permitting Warrantless, Suspicionless Searches Applies Here

It follows from the fact that exceptions to the default warrant requirement are rare, that exceptions to the requirement of at least some level of individualized suspicion are even rarer. Time and again, this Court has reiterated that the Fourth Amendment's "restraint on government conduct generally bars officials from undertaking a search or seizure absent individualized suspicion"—a "rule" that is subject only to certain "limited," "particularized," and "closely guarded" exceptions. *Chandler* v. *Miller*, 520 U.S. 305, 308, 309, 313 (1997); see, *e.g.*, *Ferguson* v. *City of Charleston*, 532 U.S. 67, 85-86 (2001); *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 37 (2000).

The general prohibition of suspicionless searches has deep historical roots. The adoption of the Fourth Amendment was in large part motivated by a disdain for British use of general searches—whether in the form of searches authorized by general warrants lacking in particularity, see, *e.g.*, *Chimel* v. *California*, 395 U.S. 752, 761 (1969); *Henry* v. *United States*, 361 U.S. 98, 100-101 (1959), or blanket searches lacking in individualized suspicion, see, *e.g.*, *Vernonia School District 47J* v. *Acton*, 515 U.S. 646, 670 (1995) (O'Connor, J., dissenting); *Carroll* v. *United States*, 267 U.S. 132, 153-154 (1925); Wil-

liam J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602-1791*, at 286 (2009). As this Court has noted, suspicionless searches "implicate[] the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects." *Gant*, 556 U.S. at 345.

None of the existing exceptions permitting warrantless, suspicionless searches is applicable here. To varying extents, petitioner and the United States invoke three such exceptions: (1) the exception for searches of parolees, based on their diminished expectations of privacy; (2) the exception for searches based on "special needs" beyond the ordinary need for law enforcement; and (3) the exception for searches incident to arrest. Those exceptions cannot justify the warrantless collection and analysis of DNA from arrestees for the purpose of determining their involvement in offenses other than the offense of arrest—offenses for which there is no individualized suspicion.

1. The Exception For Searches Of Parolees Is Inapplicable Because Arrestees Maintain Reasonable Expectations Of Privacy Until Conviction

Of all this Court's decisions, petitioner and the United States rely most heavily on *Samson* v. *California*, 547 U.S. 843 (2006). See Pet. Br. 12, 13, 16, 17, 20; U.S. Br. 8, 11, 13, 14, 27. In *Samson*, the Court addressed the question whether "a condition of release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the Fourth Amendment." 547 U.S. at 847. The Court concluded that, as a result of his "status as a parolee," the individual challenging the search "did not have an expectation of privacy that society would recognize as legitimate." *Id.* at 852.

a. The exception recognized in *Samson* for parolees does not apply to mere arrestees such as respondent. This Court did not suggest in *Samson*, and has never suggested since, that the exception to the individualized-suspicion requirement for parolees would extend beyond individuals who have already been convicted of crimes to individuals who have merely been arrested. And that is unsurprising, because it is the fact of conviction—not mere arrest—that serves as the "transformative change[]" resulting in an across-the-board curtailment of an individual's expectations of privacy (and, indeed, of other constitutional rights). *United States* v. *Kincade*, 379 F.3d 813, 834 (9th Cir. 2004) (en banc), cert. denied, 544 U.S. 924 (2005); see, *e.g.*, *McKune* v. *Lile*, 536 U.S. 24, 36 (2002) (plurality opinion); *Boyd* v. *United States*, 116 U.S. 616, 630 (1886). The resulting reduction in expectations of privacy applies not only to individuals who are imprisoned, see, *e.g.*, *Hudson* v. *Palmer*, 468 U.S. 517, 530 (1984), but also to individuals who have been released but remain under the supervision of the state (such as individuals on parole or supervised release), see, *e.g.*, *Samson*, 547 U.S. at 850; *Ferguson*, 532 U.S. at 79 n.15; *Griffin* v. *Wisconsin*, 483 U.S. 868, 874-875 (1987).[10] Largely for that reason, lower courts have consistently held that the collection and analysis of DNA from *convicted* individuals is constitutional. See p. 5, *supra*.

Arrestees, however, are differently situated. And perhaps the best evidence that arrestees do not suffer an across-the-board reduction in their expectations of privacy comes from this Court's cases concerning the

---

[10] This Court has left open the question whether suspicionless searches of probationers would also be valid under the Fourth Amendment. See *Knights*, 534 U.S. at 120 n.6.

search-incident-to-arrest doctrine. If it were true that an arrest had such a transformative effect on an individual's privacy interests, those cases would have been easy ones, because a valid arrest would provide essentially unfettered authority to conduct an accompanying search—even for evidence of criminal activity unrelated to the crime of arrest. Indeed, that was seemingly the view expressed by Justice Powell, in language on which petitioner relies. See Pet. Br. 17 n.4 (quoting *United States* v. *Robinson*, 414 U.S. 218, 237-238 (1973) (concurring opinion)).

But that view did not command a majority of the Court at the time, and it has not since. See *Gant*, 556 U.S. at 335. To the contrary, this Court has carefully delineated the bounds of police authority to conduct searches incident to arrest, holding that the authority is limited by the rationales of ensuring officer safety and preventing the destruction of evidence, see *Chimel*, 395 U.S. at 763, and (at least in the vehicle context) gathering evidence relevant to the offense of arrest, see *Gant*, 556 U.S. at 335. Although the Court has framed its search-incident-to-arrest rules in objective terms to provide guidance to courts and officers in the field, see, *e.g.*, *Chimel*, 395 U.S. at 763, it has never suggested that the mere fact of arrest could justify a suspicionless search for evidence of criminal activity unrelated to the offense of arrest. And the Court's approach is consistent with the approach at common law—which did not afford officers unlimited authority to conduct searches incident to arrest, but at most permitted searches pursuant to the twin rationales the Court has adopted. See *Thornton* v. *United States*, 541 U.S. 615, 629-631 (2004) (Scalia, J., concurring).

b. Admittedly, the liberty of an arrested individual is restricted in one obvious way: the individual has been

seized and may be detained until trial for the offense of arrest. The seizure of an arrestee, in turn, may entail other permissible intrusions. An arrestee who is being detained may be searched to serve special needs associated with admission into, and continued presence in, the general jail population. See *Florence* v. *Board of Chosen Freeholders*, 132 S. Ct. 1510, 1515-1518 (2012); *Bell* v. *Wolfish*, 441 U.S. 520, 558-560 (1979). Conversely, an arrestee who is being released may be subject to reasonable conditions of release. See, *e.g.*, *United States* v. *Scott*, 450 F.3d 863, 868-874 (9th Cir. 2006).

When it comes to the government's authority to conduct searches for investigative purposes, however, an arrestee is presumed to be innocent, and stands in the same position as an ordinary citizen in every respect but one: the government assertedly has probable cause to believe that the arrestee has committed the offense of arrest.[11] As a result, if the government wishes to conduct a search of an arrestee's home or person to link the arrestee to the offense of arrest, it will naturally be easier for the government to make the requisite showing that there is reason to believe the search would uncover evidence relevant to the crime. Cf. *Missouri* v. *McNeely*, No. 11-1425 (argued Jan. 9, 2013). In all other respects, however, an arrestee—unlike a convicted individual, but like an ordinary citizen—retains the full protections of the Fourth Amendment. Where, as here, the government wishes to conduct an investigative search of an ar-

---

[11] Indeed, the Maryland Act recognizes as much, because it provides for destruction of an arrestee's DNA sample (and expungement of his DNA profile) if the arrestee is not convicted—at which point the arrestee indisputably stands in the same position as an ordinary citizen. See Md. Code Ann., Pub. Safety § 2-511(a)(1), (c).

restee not to link him to the offense of arrest, but to other offenses for which there is no individualized suspicion, this Court's decision in *Samson* provides no justification for dispensing with the warrant and individualized-suspicion requirements.[12]

2. *The 'Special Needs' Exception Is Inapplicable Because The Primary Purpose Of The Maryland Act Is To Serve The Ordinary Law Enforcement Interest In Crime Control*

Perhaps the most significant exception to the requirement of individualized suspicion is the "special needs" doctrine.[13] Although petitioner and the United States liberally rely on cases applying the "special needs" doctrine, petitioner does not specifically invoke that doctrine before this Court, and the United States invokes it only in passing. See U.S. Br. 32 n.12. That is understandable, because the "special needs" doctrine plainly does not apply here.

a. Under the "special needs" doctrine, a court does indeed balance the government's interests and an individual's privacy interests to determine whether a partic-

---

[12] *Samson* is distinguishable for an additional reason. In that case, the Court emphasized the presence of a parole condition that "clearly expressed" to the parolee the requirement that he submit to suspicionless searches. 547 U.S. at 852 (citation omitted). Here, by contrast, respondent did not submit to DNA testing as a voluntary condition of release; he was subject to mandatory testing simply because of his status as a qualifying arrestee. See Md. Code Ann., Pub. Safety § 2-504(a)(3).

[13] The following discussion assumes the validity of the "special needs" doctrine. But cf. *Edmond*, 531 U.S. at 56 (Thomas, J., dissenting) (expressing "doubt" that "the Framers of the Fourth Amendment would have considered 'reasonable' a program of indiscriminate stops of individuals not suspected of wrongdoing").

ular government practice is reasonable. As the name suggests, however, the "special needs" doctrine is triggered only upon a threshold showing of a "special need": that is, a showing that the "primary purpose" of the program in question goes "beyond the normal need for law enforcement." *Ferguson*, 532 U.S. at 81; *Griffin*, 483 U.S. at 873; see *Edmond*, 531 U.S. at 44-47. This Court has made clear that it will not "simply accept the State's invocation of a 'special need,'" but will "carr[y] out a close review of the scheme at issue" to determine whether a "substantial" and "concrete" special need exists. *Ferguson*, 532 U.S. at 81 (internal quotation marks and citation omitted); *Chandler*, 520 U.S. at 313, 318-319, 321.

It cannot seriously be disputed that the "primary purpose" of the Maryland Act—like other DNA-testing statutes—is to serve the "general interest in crime control," *Edmond*, 531 U.S. at 44 (citation omitted), by helping both to solve unsolved crimes and to prevent future ones. One need not look far to find that purpose: it is right there on the face of the statute. See Md. Code Ann., Pub. Safety § 2-505(a) (stating that "DNA samples shall be collected and tested * * * as part of an official investigation into a crime"). In his statement supporting the expansion of the Act to arrestees, moreover, Governor O'Malley testified that the expansion would allow law enforcement "to more efficiently resolve open criminal investigations, pursue repeat offenders, and save valuable time pursuing false leads by effectively eliminating suspects from ongoing investigations." *Hearing on S.B. 211 Before the S. Comm. on Judicial Proceedings*, 2008 Leg., 425th Sess. (Md. Feb. 13, 2008) (statement of Governor Martin O'Malley). Even after certiorari was granted in this case, Governor O'Malley reiterated that the expansion "is absolutely critical to our efforts to continue driving down crime in Maryland and bolsters our

efforts to resolve open investigations and bring them to a resolution." Governor Martin O'Malley, Statement on the Supreme Court's Decision to Hear State's DNA Case (Nov. 9, 2012) <tinyurl.com/omalleydna>.[14]

What is more, this Court has indicated that the "special needs" doctrine is applicable only where law enforcement plays a limited role in the actual implementation of the program at issue. See, *e.g.*, *Ferguson*, 532 U.S. at 79 & n.15, 82; *id.* at 88 (Kennedy, J., concurring); *Vernonia*, 515 U.S. at 658; *New Jersey* v. *T.L.O.*, 469 U.S. 325, 341 n.7 (1985). Here, the role of law enforcement in collecting and analyzing an arrestee's DNA is "central and indispensable." *Ferguson*, 532 U.S. at 80. Take respondent's case. After the Maryland police arrested respondent, personnel at the Wicomico County central booking facility collected his DNA sample. J.A. 86. The Forensic Sciences Division of the Maryland State Police processed the sample; stored the resulting profile; determined that the profile produced a match; and notified the Salisbury Police Department, which proceeded to obtain an indictment. J.A. 87-89. The role of law enforcement in Maryland's DNA-testing program is therefore pervasive—and that is no coincidence, because that program serves the paradigmatic law enforcement interest in solving crimes.

b. Although petitioner and the United States do not specifically invoke the "special needs" doctrine, they cite three governmental interests in support of the collection and analysis of DNA from arrestees. None of those in-

---

[14] Unsurprisingly, Congress's purpose in enacting and expanding the federal DNA statute was the same. See, *e.g.*, H.R. Rep. No. 711, 108th Cong., 2d Sess. 2, 3 (2004); H.R. Rep. No. 900, 106th Cong., 2d Sess., Pt. I, at 8-11, 23-27, 32-36 (2000).

terests could support the application of the "special needs" doctrine.

i. Petitioner and the United States cite the government's interest in solving crimes. Pet. Br. 23-24; U.S. Br. 29-31. Tellingly, they both cite that interest last—even though it was plainly the predominant purpose behind the Maryland Act (and other DNA-testing statutes). As discussed above, that interest cannot possibly justify application of the "special needs" doctrine, because it is simply the "general interest in crime control" by another name. *Edmond*, 531 U.S. at 44 (citation omitted).[15]

ii. Petitioner and the United States primarily cite the government's interest in "identifying" individuals who are in custody. Pet. Br. 21-23; U.S. Br. 25-26. As a preliminary matter, if, by "identification," they mean investigating crimes and determining the perpetrators, then any interest in "identification" simply collapses into the interest in solving crimes.

The more natural understanding of "identification," however, is simply "ascertain[ing] or establish[ing] * * * who a given person is": for example, determining or confirming that the person in custody here was Alonzo King. 7 *Oxford English Dictionary* 619 (2d ed. 1989) (definition 2(a) of "identify"). So understood, the purpose of identifying an individual in the government's

---

[15] As part of its discussion of the government's interest in solving crimes, the United States notes that "[i]dentifying the true perpetrator of a crime also can exonerate the innocent." Br. 29. That specific interest, however, would be more directly served by permitting an individual who has been convicted of a crime to have access to forensic evidence collected at the crime scene so that he can test it against his *own* DNA. See *District Attorney's Office for Third Judicial District* v. *Osborne*, 557 U.S. 52, 62 (2009).

custody is arguably discrete enough to constitute a special need. But there is no reason to believe that identifying individuals in custody was an actual purpose behind the Maryland Act. Unlike the Maryland statute governing the intake of prisoners, which provides that the state may fingerprint and photograph inmates (and conduct other booking procedures) for the express purpose of "identify[ing]" them, see Md. Code Ann., Corr. Servs. § 3-601(e), the Act broadly authorizes the testing of an arrestee's DNA "as part of an official investigation into a crime." Md. Code Ann., Pub. Safety § 2-505(b)(2).[16]

Just as importantly, as it is now conducted, DNA testing does not play a meaningful role in identifying individuals in custody. When law enforcement agencies obtain a DNA profile from an arrestee, they compare the profile against CODIS's index of DNA profiles created from forensic evidence collected at crime scenes—and not, as a matter of course, against the separate indices of DNA profiles of convicted offenders and other arrestees. And even if they did compare the profile against the latter indices, CODIS stores only the DNA profiles themselves and does not store any identifying information, such as an individual's name, fingerprint, photograph, or criminal history. In order to obtain that information upon securing a match with an individual profile, a law enforcement agency must contact the agency that initially stored the matching profile. See U.S. Br. 19.

In addition, given the substantial time lag that typically occurs between the collection of a DNA sample and the preparation and analysis of a DNA profile, it is hard to see how DNA testing *could* play a meaningful role in

---

[16] In fact, Maryland uses an individual's fingerprints as a means of identifying his DNA sample. See Md. Code Regs. 29.05.01.07(C).

identification in the mine run of cases. This case illustrates the point: respondent's DNA was collected on the day of his arrest, but a match was not returned until almost four months later—and only a few weeks before the proceedings on the assault charge were terminated. See J.A. 86 & n.3, 88. The government's interest in identification therefore cannot supply a "special need" to justify warrantless, suspicionless DNA testing.

iii. Petitioner and the United States also cite the government's interest in supervising arrestees before trial. Pet. Br. 22-23; U.S. Br. 26-29. To begin with, to the extent they argue that it would be useful to know whether an arrestee has committed *other*, previously unsolved offenses before the arrestee's trial on the offense of arrest (so that the arrestee not only can be detained for the initial offense but can be charged with additional offenses), that interest, too, simply collapses into the general interest in solving crimes.

But in any event, the proffered interest in supervising arrestees before trial fails for materially the same reasons as the interest in identification. Petitioner cites no evidence suggesting that an interest in supervising arrestees was an "actual[]" purpose behind the Maryland Act—or, for that matter, any other DNA-testing statute. See *Ferguson*, 532 U.S. at 81. Supervising arrestees is not one of the enumerated purposes for DNA testing listed in the Maryland Act. See Md. Code Ann., Pub. Safety § 2-505(a).

In addition, petitioner cites no evidence that DNA testing in fact serves an interest in supervising arrestees. As with the interest in identification, the substantial time lag that typically occurs between the collection of a DNA sample and the preparation and analysis of a DNA profile would suggest that DNA testing does not meaningfully serve an interest in supervision—even

if it is theoretically possible that delayed DNA testing could still lead to a revocation of release, see U.S. Br. 27 n.10. And petitioner fails to cite a single case in which DNA testing has actually affected a decision on supervision in Maryland,[17] much less to show that there is a "substantial" and "concrete" problem with supervising arrestees in Maryland that could validly trigger the "special needs" doctrine. *Chandler*, 520 U.S. at 313, 318-319.

In short, it is clear that the only real purpose behind the Maryland Act is the one that common sense would suggest: *viz.*, that the Act was intended to help solve and prevent crimes. The "special needs" doctrine is therefore inapplicable here. This Court should refuse to permit petitioner and the United States to invoke the balancing permitted by that doctrine without satisfying the threshold requirement of a "special need."

3. *The Search-Incident-To-Arrest Exception Is Inapplicable For Multiple Reasons*

To the extent that petitioner and the United States seek to invoke the search-incident-to-arrest doctrine, it too is inapplicable here. See Pet. Br. 17; U.S. Br. 12, 15. As a preliminary matter, this Court has long understood that a search can be "incident" to arrest, and therefore proceed without a warrant and probable cause, "only if it is substantially contemporaneous with the arrest." *Shipley* v. *California*, 395 U.S. 818, 819 (1969) (per curiam) (citation omitted). It is far from clear whether the search here was "substantially contemporaneous": the

---

[17] It bears noting that the Maryland Act applies only to individuals who have been charged with crimes of violence and burglaries, see Md. Code Ann., Pub. Safety § 2-504(a)(3)—and who are therefore among the least likely arrestees to be released before trial.

collection of respondent's DNA took place not at the point of arrest, but only after respondent had been charged with the assault. In addition, this Court has suggested that the search-incident-to-arrest doctrine, while permitting searches of the person, does not permit physical intrusions into the body like the search at issue. See *Schmerber*, 384 U.S. at 769-770; cf. *McNeely*, *supra*.

Even if the search-incident-to-arrest doctrine were otherwise applicable, moreover, the rationales for that doctrine, see p. 25, *supra*, would not justify the search here. In particular, assuming that such a rationale applies outside the vehicle context, the collection of respondent's DNA could not be said to constitute the gathering of evidence relevant to the offense of arrest, see *Gant*, 556 U.S. at 335, because it is undisputed that the state did not conduct the DNA testing to link respondent to the alleged assault. Where, as here, the state collects an arrestee's DNA to determine his involvement in other offenses for which there is no individualized suspicion, neither the search-incident-to-arrest doctrine nor any other existing exception to the warrant and individualized-suspicion requirements justifies the search.

C. For Fourth Amendment Purposes, DNA Testing Is Not Analogous To Fingerprinting

In a final effort to invoke existing law in support of their position, petitioner and the United States contend that the warrantless, suspicionless collection and analysis of DNA from arrestees is analogous to fingerprinting. See Pet. Br. 19; U.S. Br. 19-22. The United States goes so far as to describe what took place here as "DNA fingerprinting"—as if repeatedly using that facially inaccurate phrase would make the analogy ring true. See U.S. Br. 2, 4, 7, 8, 9, 10, 14, 19, 20, 21, 22, 24, 26, 28, 29, 30, 31, 32, 33.

Although both petitioner and the United States rely on the analogy with fingerprinting, they play coy about the doctrinal basis for the premise of that analogy: *viz.*, that the mandatory fingerprinting of arrestees is constitutional. This Court has never squarely addressed the issue. In light of the long history of fingerprinting arrestees upon booking, respondent does not dispute the constitutionality of that practice. But neither of the two potential justifications for that practice applies to the collection and analysis of DNA.

1. As a preliminary matter, there is good reason to believe that fingerprinting does not give rise to a "search" for Fourth Amendment purposes. To state the obvious, fingerprinting does not involve an intrusion into the person of the type that took place here. And as a result of the long history of fingerprinting, "we have come to accept that people—even totally innocent people—have no legitimate expectation of privacy in their fingerprints, and that's that." *Kincade*, 379 F.3d at 874 (Kozinski, J., dissenting). To the extent this Court has addressed the validity of fingerprinting, it has seemingly taken the same view, observing that "[f]ingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." *Davis* v. *Mississippi*, 394 U.S. 721, 727 (1969).

Notably, it appears to be the position of the United States that fingerprinting does not constitute a search. Just two Terms ago, this Court heard oral argument in *Tolentino* v. *New York*, 131 S. Ct. 1387 (2011), which presented the question whether an individual possessed a reasonable expectation of privacy in his identity that would justify the suppression of government records ac-

cessed once his identity was obtained.[18] At argument, the United States explained that, "[f]or * * * things like a name or even a fingerprint, this Court has said [it] is not a separate Fourth Amendment event to acquire that." Oral Arg. Tr. at 51, *Tolentino*, *supra*, No. 09-11556 (Mar. 21, 2011). "For example," the United States continued, "once someone is detained, it's not also a search to ask for their name or to take a fingerprint." *Ibid.* Given those unequivocal statements, it is curious why the United States does not have the courage of its convictions to say the same in its brief here. Curious, but understandable: if fingerprinting does not constitute a search but the DNA collection and analysis at issue here concededly does, the analogy breaks down at the first hurdle.

2. Even assuming, *arguendo*, that fingerprinting does give rise to a "search," the fingerprinting of arrestees can be justified under the "special needs" doctrine. As with other routine booking procedures such as photographing, the primary purpose of fingerprinting upon booking is to identify an individual who is being taken into the criminal-justice system, not to investigate unsolved offenses.[19] Upon collection of an arrestee's fingerprints, law enforcement agencies run those fingerprints through the FBI's Integrated Automated Fingerprint Identification System (IAFIS), a database that contains fingerprints, photographs, and criminal-history information. IAFIS contains over 73 million individual

---

[18] The petition was later dismissed as improvidently granted. See *Tolentino*, 131 S. Ct. at 1387.

[19] In Maryland, the collection of DNA from an arrestee takes place only after the arrestee has been charged. See Md. Code Ann., Pub. Safety § 2-504(a)(3).

profiles in its criminal-offender index and another 36 million individual profiles in its civil index. Searches of the criminal-offender index for "ten-print" matches are completed in a matter of minutes, if not seconds. See FBI, *Integrated Automated Fingerprint Identification System* <tinyurl.com/aboutiafis> (last visited Jan. 25, 2013); FBI, *Integrated Automated Fingerprint Identification System—Fact Sheet* <tinyurl.com/iafisfacts> (last visited Jan. 25, 2013).

Critically, although IAFIS does contain a much smaller index of "latent" fingerprints (*i.e.*, individual fingerprints taken from forensic evidence collected at crime scenes), law enforcement agencies do not search that index as a matter of course upon collection of an arrestee's fingerprints. Obtaining a match with a latent fingerprint takes longer and is a more complex enterprise, typically requiring specialized software and the use of a trained examiner. See FBI, *Integrated Automated Fingerprint Identification System—Five Key Services* <tinyurl.com/iafisservices> (last visited Jan. 25, 2013); Department of Justice, Office of the Inspector General, *Follow-Up Review of the Status of IDENT/IAFIS Integration* 4 (Dec. 2004) <tinyurl.com/iafisreview>. And fingerprinting cannot serve other investigative purposes for which DNA testing is increasingly being used—such as "familial searching," whereby partial matches trigger the investigation of family members of the individual from whom the DNA sample was taken. See, *e.g.*, Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 Mich. L. Rev. 291, 297-300 (2010).

Again, the United States has recognized this very distinction. In its brief, the United States acknowledges that fingerprinting is "designed to reveal [an arrestee's] identity" and that law enforcement agencies use an arrestee's fingerprints (and other information obtained at

booking) "to call up an arrestee's criminal record and to determine whether he is wanted for a crime." U.S. Br. 16. And at oral argument in *Tolentino*, in arguing that "the Court doesn't need to * * * say [that] all sorts of biometric information should be treated the same," the government noted that an individual's name or fingerprints were types of "information traditionally used to identify a defendant," whereas "DNA evidence * * * might provide competing considerations." Oral Arg. Tr. at 52, *Tolentino*, *supra*. Indeed it does. Because fingerprinting of arrestees serves the primary purpose of identification, whereas DNA testing serves the primary purpose of helping to solve and prevent crimes, the two practices are readily distinguishable.

D. There Is No Valid Justification For Creating A New Exception Permitting The Warrantless, Suspicionless Search At Issue Here

Unable to invoke any justification under existing law in support of their position, petitioner and the United States effectively ask this Court to create a new exception to the presumptive warrant and individualized-suspicion requirements for DNA testing. All of their arguments in support of that new exception lack merit.

1. a. Petitioner and the United States contend that this Court can dispense with the presumptive warrant and individualized-suspicion requirements, and resort to balancing, where "[a search] involves modest intrusions on the individual's privacy" or where "the governmental need is especially great." U.S. Br. 12; see *id.* at 8; Pet. Br. 13-16, 23-25.

That contention gets it exactly backwards. In analyzing a claim that the government's conduct violates the Fourth Amendment, this Court does not start by balancing an individual's privacy interests and the government's interests, and then apply the warrant and indi-

vidualized-suspicion requirements only where those interests are roughly in equipoise. Instead, the Court starts from the propositions that "[p]rior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights," *United States District Court*, 407 U.S. at 318, and that the Fourth Amendment's "restraint on government conduct generally bars officials from undertaking a search or seizure absent individualized suspicion," *Chandler*, 520 U.S. at 308. As discussed above, see pp. 22-34, the Court dispenses with those presumptive requirements only where the government provides an articulable justification for doing so—for instance, because the individual challenging the conduct is entitled only to a diminished expectation of privacy, see *Samson*, 547 U.S. at 852, or because the government's conduct serves "'special needs' other than the normal need for law enforcement," *Ferguson*, 532 U.S. at 74 n.7.

A balancing-first approach would have pernicious consequences. It would greatly diminish the role that neutral and detached magistrates play in "protect[ing] personal privacy and dignity against unwarranted intrusion by the State," *Schmerber*, 384 U.S. at 767, and thus reduce the Fourth Amendment to an after-the-fact protection for individual liberties. And it would require courts to engage in the difficult enterprise of balancing law enforcement and privacy interests, whether on a programmatic or a case-by-case basis—an enterprise that is "more like judging whether a particular line is longer than a particular rock is heavy," *Bendix Autolite Corp.* v. *Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment), and one that undoubtedly favors the government, given the understandable temptation to defer to the government's own assessment of its law enforcement interests. All this

is not to say that balancing should play no role in Fourth Amendment analysis; instead, balancing should be the method of analysis of last, not first, resort, and only upon the identification of a discrete justification for dispensing with the presumptive warrant and individualized-suspicion requirements.

b. In addition, this Court has already rejected the specific contention that it can dispense with the warrant and individualized-suspicion requirements where a search involves only a modest intrusion—even assuming, *arguendo*, that the intrusion at issue here was a modest one. But see pp. 45-48, *infra*. In *Arizona* v. *Hicks*, 480 U.S. 321 (1987), officers lawfully entered an apartment without a warrant, based on exigent circumstances. *Id.* at 323. Once in the apartment, one of the officers saw some stereo components, which he suspected to be stolen. *Ibid.* Accordingly, the officer read and recorded the components' serial numbers, which required him to move some of the components. *Ibid.*

The Court held that, even though the movement of the stereo components was minimally intrusive, it nevertheless constituted an unreasonable search under the Fourth Amendment. See *Hicks*, 480 U.S. at 324-325. The Court reasoned that the movement of the components was a "new invasion of [the defendant's] privacy unjustified by the exigent circumstance that validated the entry." *Id.* at 325. And critically for present purposes, the Court rejected the argument that a *de minimis* search did not require a warrant, reasoning that "[a] search is a search, even if it happens to disclose nothing but the bottom of a turntable." *Ibid.* So too here. Even if the collection of DNA by means of a cheek swab is thought to be "relatively noninvasive," *Chandler*, 520 U.S. at 318, it is concededly a "search" that triggers the

protections—and ordinary rules—of the Fourth Amendment.

c. Similarly, this Court has never accepted the proposition that it can dispense with the warrant and individualized-suspicion requirements simply because "the governmental need is especially great." U.S. Br. 12. To begin with, as discussed above, the primary governmental interest served by DNA testing is the ordinary law enforcement interest in solving and preventing crimes. See pp. 28-29, *supra*. Respondent does not dispute that the problem of unsolved crimes is a grave one, particularly in certain jurisdictions. See California Br. 5-6. But this Court has repeatedly emphasized that "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose." *Edmond*, 531 U.S. at 42. To accept that contention would be to hold that "in the administration of the criminal law the end justifies the means." *Olmstead* v. *United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

Facing that difficulty, petitioner resorts to the argument that DNA Is Different: namely, that DNA testing should be treated differently because it is an exceptionally effective tool—the "gold standard"—for solving and preventing crimes. See Pet. Br. 21-23. That mode of argument is a familiar one; this Court sees it to some extent in virtually every case involving the application of the Fourth Amendment to new technologies.

To be sure, DNA testing is unquestionably a valuable law enforcement tool and "has the potential to significantly improve both the criminal justice system and police investigative practices." *District Attorney's Office for Third Judicial District* v. *Osborne*, 557 U.S. 52, 55 (2009). But like any technology, DNA testing is imperfect: there are cases in which DNA testing involves sub-

jective analysis and identifies the perpetrator only with a low degree of certainty (such as cases in which the forensic DNA sample is degraded or contains a mixture of the perpetrator's and victim's DNA);[20] other cases in which contamination or laboratory errors lead to the identification of the wrong perpetrator;[21] and still other cases in which DNA testing alone "does not * * * resolve a case," because "there is * * * an explanation for the DNA result." *Id.* at 62; see *McDaniel* v. *Brown*, 130 S. Ct. 665, 670-671 (2010) (per curiam). While DNA testing undoubtedly represents a technological advance, that fact alone does not justify a departure from generally applicable Fourth Amendment rules.

2. The United States suggests that this Court can dispense with the presumptive warrant and individualized-suspicion requirements where "protections are in place that limit the discretion of officers in the field." U.S. Br. 12; see *id.* at 9, 10, 33.

First, it is hard to see why it is better, rather than worse, for Fourth Amendment purposes that the Maryland Act requires DNA testing on a blanket basis—thus leading to more, rather than fewer, searches in the absence of a warrant or individualized suspicion. Cf. *Vernonia*, 515 U.S. at 671 (O'Connor, J., dissenting) (noting that "[t]he view that mass, suspicionless searches, however evenhanded, are generally unreasonable remains

---

[20] See, *e.g.*, Itiel E. Dror & Greg Hampikian, *Subjectivity and Bias in Forensic DNA Mixture Interpretation*, 51 Sci. & Justice 204, 204-208 (2011).

[21] See, *e.g.*, William C. Thompson, *Forensic DNA Evidence: The Myth of Infallibility*, in *Genetic Explanations: Sense and Nonsense* 227, 230-231, 233, 237 (Sheldon Krimsky & Jeremy Gruber, eds., 2012).

inviolate in the criminal law enforcement context"). Although it is true that many of the programs this Court has upheld under the special-needs doctrine involved blanket searches, those cases are distinguishable because there was a discrete justification for the search. This Court has never suggested that the absence of discretion can itself serve as a justification for dispensing with the ordinary mode of Fourth Amendment analysis and resorting to balancing.

To the extent that this Court has expressed affirmative concern in Fourth Amendment cases about *excessive* law enforcement discretion, see, *e.g.*, *Gant*, 556 U.S. at 345, statutes requiring the DNA testing of arrestees do not actually eliminate discretion. Far from it. Even in a State such as Maryland, which requires the DNA testing only of arrestees charged with crimes of violence and burglaries, prosecutors and police will often have considerable latitude to charge defendants with offenses that qualify for DNA collection. Once again, this case illustrates the point: respondent was initially charged with both first-degree assault and second-degree assault, but the first-degree assault charge was subsequently dropped. If respondent had been charged only with second-degree assault in the first place, he would not have been subject to DNA testing under the Act. See Md. Code Ann., Pub. Safety § 2-501(e).

If anything, the problem with discretion is even more acute with statutes such as the federal DNA statute, which require the DNA testing of *all* arrestees. As a practical matter, such statutes leave the availability of DNA collection up to the arresting officer, who has broad discretion to decide whether to conduct an arrest—particularly when it comes to minor offenses. See, *e.g.*, Jim Dwyer, *Whites Smoke Pot, But Blacks Are Arrested*, N.Y. Times, Dec. 23, 2009, at A24 (citing statistics

showing that, in New York City, blacks were seven times more likely, and Hispanics four times more likely, than whites to be arrested for marijuana possession). If this Court permits the government to collect and analyze the DNA of arrestees without a warrant or individualized suspicion, it will therefore effectively cede to law enforcement considerable power to choose whom to search for involvement in unrelated crimes.

3. Perhaps most remarkably, the United States suggests that this Court should dispense with the warrant requirement where "the governmental need is * * * especially likely to be frustrated by [that] requirement." U.S. Br. 12; see *id.* at 8-9, 10, 32-33.

That suggestion should be dismissed out of hand. It is certainly true that prohibiting law enforcement from collecting and analyzing an arrestee's DNA for the purpose of determining his involvement in unrelated crimes will hinder its ability to solve those crimes—just as it would to prohibit law enforcement from stopping every individual in a particular neighborhood, or searching every home in that neighborhood, without a warrant. As one member of this Court recently put it, "[a]ll law enforcement would be a lot easier if we didn't have the doggone Fourth Amendment." Oral Arg. Tr. at 57, *Bailey* v. *United States*, No. 11-770 (Nov. 1, 2012). But the Fourth Amendment exists for the "overriding" purpose of "protect[ing] personal privacy and dignity against unwarranted intrusion by the State." *Schmerber*, 384 U.S. at 767. The mere fact that the warrant requirement may serve as an impediment to law enforcement is no justification for discarding it. And as we will now explain, even if this Court were to resort to balancing here, the substantial privacy interests implicated by the Maryland Act outweigh the incremental benefits to law enforcement of the expansion to arrestees.

E. Should This Court Evaluate The Warrantless, Suspicionless Search At Issue Here By Balancing Interests, Respondent's Privacy Interests Outweigh The Government's Interests

Under their preferred balancing approach, petitioner and the United States contend that the government's interests in collecting and analyzing the DNA of arrestees outweigh the countervailing privacy interests. Pet. Br. 13-25; U.S. Br. 31-33. They are mistaken. And in so contending, they mischaracterize both the interests at issue and the extent to which those interests are implicated by the expansion of the Maryland Act to arrestees.

1. a. On respondent's side of the ledger, the privacy interests are substantial. To begin with, the search at issue here involved a physical intrusion into respondent's body—a type of intrusion that is at least as substantial as other types of Fourth Amendment intrusion, such as intrusions into the home. See *Schmerber*, 384 U.S. at 770.

Even beyond that intrusion, moreover, the collection of an individual's DNA raises profound privacy concerns. Our DNA is our blueprint: an individual's DNA contains not only deeply personal information about the subject's medical history and genetic conditions, but also information that can be used to make predictions about a host of physical and behavioral characteristics, ranging from the subject's age, ethnicity, and intelligence to the subject's propensity for violence and addiction. See, *e.g.*, Center for Genetics Education, *The Human Genetic Code—The Human Genome Project and Beyond* (2007) <tinyurl.com/cgegenome>; Mark A. Rothstein & Meghan K. Talbott, *The Expanding Use of DNA in Law*

Enforcement: What Role for Privacy?, 34 J.L. Med. & Ethics 153, 158 (2006).[22]

Petitioner and the United States contend that the privacy concerns here are overblown because the Maryland Act permits law enforcement only to use the information contained in the standard CODIS profile, which consists of data from 13 different loci—information, they assert, that serves no value other than for identification. See Pet. Br. 15-16; U.S. Br. 22-24. As a preliminary matter, while it is true that the loci at issue were initially selected because it was believed that they did not correspond to any particular traits or characteristics, the scientific understanding is rapidly evolving: it is now well understood that "non-coding" loci play important roles in the process of gene expression, see, *e.g.*, Brendan Maher, *The Human Encyclopedia*, 489 Nature 46, 46-47 (2012), and scientific advances may allow additional personal information to be gleaned from the data from the loci contained in the standard CODIS profile (or the new loci that the FBI intends to add), see, *e.g.*, Sara H. Katsanis & Jennifer K. Wagner, *Characterization of the Standard and Recommended CODIS Markers*, 58 J. Forensic Sci. S169, S171 (2013).

Perhaps more importantly, the Maryland Act does not limit the state to using only the information contained in the standard CODIS profile. The Act permits the state to include additional genetic information in an arrestee's "DNA record" as long as that information "di-

---

[22] See also Oral Arg. Tr. at 52, *Tolentino*, *supra* (statement by the United States noting that, "unlike a name or fingerprint, DNA evidence * * * could lead to other types of information * * * that may not be relevant to the criminal justice system, medical records, genetic information").

rectly relate[s] to the identification of individuals." Md. Code Ann., Pub. Safety § 2-505(b)(1).[23] The Act also permits the state to retain an individual's DNA sample even after a DNA profile has been prepared, see *id.* §§ 2-506(b), 2-511, and to conduct further tests on that sample for any one of a number of broad statutory purposes, including "as part of an official investigation into a crime" and "for research and administrative purposes," *id.* § 2-505(a).[24] As one commentator has noted, "[b]ecause they contain an individual's entire genome, tissue samples retained by the government threaten privacy interests the most." Elizabeth E. Joh, *Reclaiming 'Abandoned' DNA: The Fourth Amendment and Genetic Privacy*, 100 Nw. U. L. Rev. 857, 871 (2006).[25]

Petitioner and the United States correctly note that, under the Maryland Act, there are limits on the permissible use, and penalties for the misuse, of DNA samples taken from arrestees. See Pet. Br. 16; U.S. Br. 22. But at least outside the context of the "special needs" doctrine—where law enforcement plays a limited role, see

---

[23] It is our understanding that, as it did in this case, the Forensic Sciences Division of the Maryland Police Department routinely analyzes not only the 13 loci currently included in the standard CODIS profile, but also two additional loci and the gene for amelogenin (which discloses an individual's sex).

[24] Notably, if an arrestee's DNA profile results in a match, the Act requires the state to conduct "additional testing" if it wishes to use the match in any subsequent trial. Md. Code Ann., Pub. Safety § 2-510. That is why, after respondent was charged with the sexual assault, the state obtained a search warrant and collected a second DNA sample. J.A. 89.

[25] Like the Maryland Act, the federal DNA statute permits the government to retain an individual's DNA sample even after a DNA profile has been prepared.

p. 29, *supra*—this Court has never blessed a search that would otherwise violate the Fourth Amendment simply because law enforcement has promised (or, at least for the time being, bound itself) to review the information it obtains in a particular manner.[26] Like the First Amendment, the Fourth Amendment "protects against the Government; it does not leave us at the mercy of *noblesse oblige*." *United States* v. *Stevens*, 130 S. Ct. 1577, 1591 (2010). Because the search at issue here allows the state to come into possession of an individual's entire DNA, it raises substantial privacy concerns—in addition to the physical intrusion that the collection of respondent's DNA entailed.

b. On petitioner's side of the ledger, the government undoubtedly has a substantial interest in solving and preventing crimes. See p. 41, *supra*. It is not enough, however, for petitioner simply to recite that interest; petitioner bears the burden of demonstrating that the expansion of the Maryland Act to arrestees is "essential" to serve it. See *Chandler*, 520 U.S. at 315.

At the outset, two points bear repeating. First, it is undisputed that the government may collect and analyze the DNA of arrestees *once they are convicted*. See p. 24, *supra*. Second, it is also undisputed that the government may collect the DNA of arrestees where it can show that DNA analysis would be useful in linking an arrestee to the crime of arrest. See pp. 20-21, *supra*. The critical question, therefore, is whether petitioner can demon-

---

[26] To the extent petitioner and the United States rely on *Whalen* v. *Roe*, 429 U.S. 589 (1977), and *NASA* v. *Nelson*, 131 S. Ct. 746 (2011), those cases involved not the Fourth Amendment, but a claimed "constitutional right to informational privacy"—a right this Court has never actually recognized. Compare *id.* at 756 with *id.* at 765-766 (Scalia, J., concurring in the judgment).

strate that the collection and analysis of DNA from arrestees who do not fall within one of those two broad categories is essential to serve the government's interest in solving and preventing crimes.

Petitioner has completely failed to make such a showing. In fact, it does not even try. In its briefs at the certiorari and merits stages, petitioner has pointed to no evidence demonstrating the efficacy of the expansion of the Maryland Act to arrestees.[27] In its application for a stay of the judgment below (at 16-17), petitioner did cite a report indicating that the collection and analysis of DNA from arrestees has resulted in an average of 19 matches resulting in charges, and 10 matches resulting in convictions, for each year that the expansion to arrestees has been in effect. See Maryland State Police, Forensic Sciences Division, *2011 Annual Report: Statewide DNA Database Report* 8 (Apr. 2012) <tinyurl.com/marylandreport>. Those statistics, however, seemingly include arrestees who were subsequently convicted of the crimes of arrest (and whose DNA indisputably could have been collected at that point) and arrestees whose DNA could have been collected because it was relevant to the crime of arrest—as well as arrestees who had previously been convicted of other crimes (but whose DNA had not previously been collected). See J.A. 171 (Roberts, C.J., granting application) (noting that respondent had made "sound points" about the limited impact of the decision below). If anything, the statistics bear out what common sense would suggest: *viz.*, that there are diminishing returns to the expansion of DNA testing from in-

---

[27] For its part, the United States simply cites generic statistics about the efficacy of DNA testing, without distinguishing between convicts and arrestees. See U.S. Br. 30.

dividuals who have been convicted to individuals who have merely been arrested.

Petitioner's amici vividly recount individual cases in which the collection of DNA upon arrest either helped to solve previously unsolved crimes or might have helped to prevent the commission of subsequent ones. See, *e.g.*, California Br. 10-13. Only the most hard-hearted person could fail to be moved by those examples. But there are undoubtedly also individual cases in which the same could be said about the collection of DNA from ordinary citizens. Without more, anecdotal evidence about the efficacy of conducting DNA testing on arrestees cannot justify the substantial intrusions that resulted from the collection and analysis of respondent's DNA.

2. In concluding that the government's interests here outweigh the countervailing privacy interests, petitioner and the United States offer no meaningful limiting principle to their analysis. Although the Maryland Act requires the DNA testing only of arrestees charged with crimes of violence and burglaries, petitioner offers no basis for analyzing the validity of DNA testing differently depending on the crime of arrest. Nor does the United States—perhaps not surprisingly, because federal law mandates DNA testing of all arrestees. See 28 C.F.R. 28.12. And this Court has traditionally not drawn distinctions based on the crime of arrest in determining the validity of a search of an arrestee; instead, the Court has "treat[ed] all custodial arrests alike for purposes of search justification." *Robinson*, 414 U.S. at 253.

By its terms, therefore, the reasoning of petitioner and the United States is far-reaching. This Court has held that the Constitution permits law enforcement to conduct arrests even for minor traffic offenses. See *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 323 (2001). And the number of arrests in the United States is eye-

popping: there were more than *12 million* arrests in 2011 alone. See FBI, *Crime in the United States 2011—Persons Arrested* <tinyurl.com/2011arrests> (last visited Jan. 25, 2013). Indeed, one recent study concluded that, by age 23, nearly one-third of all Americans have been arrested for an offense other than a minor traffic violation. See Erica Goode, *Many in U.S. Are Arrested by Age 23, Study Finds*, N.Y. Times, Dec. 19, 2011, at A16. The Court should therefore be under no illusion as to the stakes here. If the Court adopts the approach advanced by petitioner and the United States, it will be sanctioning a monumental expansion of DNA databases—an expansion that has not been shown to have substantial benefits for crime control.

Nor does the reasoning of petitioner and the United States stop there. Aside from the erroneous contention that arrestees' expectations of privacy are diminished across the board, the only limiting principle petitioner offers is that, "[a]s a class, arrestees are far more likely than the general public" to have committed other crimes. Pet. Br. 24. Of course, where an arrestee has previously been convicted of another crime, his DNA may validly be collected and analyzed; the relevant question is therefore whether arrestees *who have not previously been convicted of another crime* are more likely as a class to have committed unsolved crimes (or to commit future ones). But more importantly, under petitioner's reasoning, it would seemingly be permissible to collect and analyze DNA from subsets of the general population—such as young men, residents of particular neighborhoods, or individuals from particular socioeconomic or educational backgrounds—as long as it could be shown that those groups have a higher incidence of criminal activity.

If anything, the United States takes an even more aggressive position: virtually all of its arguments—con-

cerning the allegedly minimal intrusion of the search, the significance of the government's interest in solving and preventing crimes, and the constraints on officer discretion—would justify the blanket collection and analysis of DNA from ordinary citizens. As the history of fingerprinting shows, moreover, that concern is far from theoretical. In California alone, the government requires fingerprinting as a condition of obtaining a driver's license, see Cal. Veh. Code § 12517.3(a)(1); receiving certain welfare benefits, see Cal. Welf. & Inst. Code § 10830(b)(1), and even becoming a member of the Bar, see Cal. Bus. & Prof. Code § 6054. If this Court upholds the practice at issue here, one can readily imagine that similar requirements for "DNA fingerprinting" will not be far behind. In New York City, the police have already developed a pilot project allowing officers to collect DNA by means of a cheek swab from individuals stopped, but not arrested, for traffic and other minor violations. See Wayne A. Logan, *Policing Identity*, 92 B.U. L. Rev. 1561, 1588 n.164 (2012).

Far from resisting the implication that the blanket collection and analysis of DNA from ordinary citizens would be permissible, the proponents of the Maryland Act affirmatively embraced it. As Attorney General Gansler put it at the time, "ultimately, someday, everybody's DNA is going to be in some sort of [a database], like with our Social Security numbers; * * * that's the way it's going to be one day down the road." *Hearing on H.B. 370 Before the H. Comm. on the Judiciary*, 2008 Leg., 425th Sess. (Md. Feb. 13, 2008) (testimony of Attorney General Douglas Gansler). Some Fourth Amendment incursions may come dressed in sheep's clothing. This wolf comes as a wolf.

* * * * *

In many ways, this case is a prime example of the potential value of DNA testing to law enforcement. The collection and analysis of respondent's DNA helped to solve a brutal crime. Under those circumstances, the temptation to bend existing constitutional principles—in interpreting a provision that, after all, speaks only of "reasonableness"—may seem irresistible. The Court should nevertheless resist it. The history of our Nation is replete with examples of creeping intrusions into individual privacy, often involving new technologies. The expansion of DNA testing is no different, save perhaps for the speed with which it has occurred.

This Court's Fourth Amendment decisions "[n]ot only * * * reflect today's values by giving effect to people's reasonable expectations of privacy," but "also shape future values by changing our experience and altering what we come to expect from our government." *Kincade*, 379 F.3d at 873 (Kozinski, J., dissenting). Should the Court uphold the blanket warrantless, suspicionless collection and analysis of DNA from arrestees, it would establish a new baseline. And it would take but modest incremental steps from that baseline to permit the preparation of more invasive profiles, such as full-genome profiles; the use of more intrusive investigative techniques, such as familial searching; and, ultimately, the collection and retention of DNA from ordinary citizens.

For the reasons stated in this brief, a ruling in petitioner's favor would be contrary to existing law. But it would also make it difficult, if not impossible, to resist further expansions of the use of DNA testing. Those expansions are assuredly coming; some of them have already arrived. This Court should draw the line here, and hold that the collection and analysis of respondent's DNA without a warrant or individualized suspicion was

unconstitutional. To hold otherwise would raise the prospect that, in the not-too-distant future, we will wake up to an America that the Framers could not have imagined—and that none of us will recognize.

CONCLUSION

The judgment of the Maryland Court of Appeals should be affirmed.

Respectfully submitted.

PAUL B. DEWOLFE
Public Defender
STEPHEN B. MERCER
Chief Attorney,
Forensics Division
OFFICE OF THE PUBLIC DEFENDER
6 Saint Paul Street,
Suite 1400
Baltimore, MD 21202

KANNON K. SHANMUGAM
JAMES M. MCDONALD
KRISTIN A. FEELEY
DAVID M. HORNIAK
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

JANUARY 2013

APPENDIX

APPENDIX

STATEMENT OF PROBABLE CAUSE
(Apr. 10, 2009)

Local Incident #0912080

Date: 04/10/2009
Time: 21:06
Related case(s):

DISTRICT COURT OF MARYLAND
FOR WICOMICO COUNTY

LOCATED AT (COURT ADDRESS)	DISTRICT COURT CASE NUMBER
201 BAPTIST ST. SALISBURY, MD 21801	

COMPLAINANT			DEFENDANT					
NAME (LAST,FIRST,M.I)		TITLE	NAME (LAST,FIRST,M.I)				TITLE	
BURT, T		OFFR	KING, ALONZO					
AGENCY	SUB AGENCY	I.D. NO. (POLICE)	MAFIS NAME (LAST,FIRST,M.I)					
DE	8270	3115	I.D.NO.	RACE B	SEX M	HT 5/8	WT. 190	D.O.B 10/19/ 82
WORK TELEPHONE	HOME TELEPHONE		HAIR	EYES	OTHER DESCRIPTION			
(410)5483165	( )		BLK	BRO				
ADDRESS		APT. NO.	WORK TELEPHONE		HOME TELEPHONE			
P O BOX 4118 699 WEST SALISBURY PARKWAY			(410)8608888		(410)8601326			
CITY	STATE	ZIP CODE	ADDRESS		APT. NO.			
SALISBURY	MD	21801	507 OVERBROOK DR.					
			CITY	STATE	ZIP CODE			
			SALISBURY	MD	21804			

☐ DOMESTIC VIOLENCE ☐ HATE CRIME PAGE 1 OF 3

STATEMENT OF PROBABLE CAUSE

ARREST ON TRAFFIC/NATURAL RESOURCES CITATIONS/CRIMINAL CHARGES/MUNICIPAL ORDINANCES/PUBLIC LOCAL LAWS

THE DEFENDANT HAS BEEN ARRESTED UPON THE FOLLOWING INFORMATION OR OBSERVATION: (MAKE A PLAIN, CONCISE AND DEFINITIVE STATEMENT OF ESSENTIAL FACTS CONSTITUTING THE OFFENSE CHARGED)

ON APRIL 10, 2009 AT 1722 HOURS I OFC T BURT 3115, RESPONDED TO 1108 MIDDLENECK DR, IN REFERENCE TO SPEAKING WITH VIC-

TIMS OF AN ASSAULT WITH A FIREARM AT 821 PRISCILLA ST (COUNTRY FOOD STORE). UPON ARRIVAL TO THE RESIDENCE I SPOKE WITH THREE WITNESSES IDENTIFIED AS CALVA DESHIELDS, LARON WOOLFORD, AND DANIELLE PATRICK THE SUBJECTS ADVISED THE FOLLOWING.

PATRICK ADVISED THAT ON APRIL 10, 2009 AT APPROX 1710 HOURS THE ABOVE MENTIONED SUBJECTS AND ANOTHER SUBJECT IDENTIFIED AS DEVON DESHEILDS, DEVON BEING DRIVER OF THE VEHICLE, DROVE TO 821 PRISCILLA ST TO PURCHASE GROCERY TYPE PRODUCTS AND FUEL. PATTRICK ADVISED THAT WHILE PARKED AT THE FUEL PUMPS A SUBJECT IDENTIFIED AS ALONZO KING APPROACHED THE VEHICLE, AND STATED "REMEMBER THAT NIGHT AT THE CLUB". PATTRICK ADVISED THAT KING THE FURNISHED A SHOTGUN AND POINTED AT THE VEHICLE. PATRICK ADVISED THAT DEVON, WOOLFORD AND, CALVA THEN EXITED THE VEHICLE AND FLED THE AREA ON FOOT. PATTRICK ADVISED THAT SHE THEN MOVED TO THE DRIVER SEAT OF THE VEHICLE AND FLED THE AREA IN HER VEHICLE. PATTRICK ADVISED THAT WHILE EN-ROUTE TO 1108 MIDDLENECK DR SHE NOTIFIED THE POLICE. PATTRICK DESCRIBED THE VEHICLE THAT KING FLED IN AS A GREY IN COLOR NISSAN ARMANDA.

CALVA ADVISED THAT SHE WAS A PASSENGER IN A VEHICLE OPERATED BY DEVON, AND

THE ABOVE MENTIONED SUBJECTS. CALVA ADVISED THAT SHE OBSERVED KING APPROACH THE VEHICLE AND FURNISH A SHOTGUN, AT WHICH TIME SHE EXITED THE VEHICLE AND FLED THE AREA ON FOOT ARRIVING AT 1008 MIDDLENECK DR.

[2] WOOLFORD ADVISED THE SAME AS CALVA; HOWEVER WOOLFORD WAS VERY UNCOOPERATIVE WITH POLICE. WOOLFORD ADVISED THAT THE POLICE WILL DO NOTHING TO PROTECT HIM AND THAT; HE IS NOT DOING ANYTHING TO HELP. WOOLFORD DID REFUSE TO TAKE PART IN A LATER ONE ON ONE IDENTIFICATION.

WHILE AT 1108 MIDDLENECK DR, CPL KUCZENSKI 128, AND OFC BATSON 3191 WERE AT 638 DECATUR AV SPEAKING WITH THE FOURTH VICTIM DRIVER OF THE VEHICLE DEVON. WHILE OFFICERS WERE SPEAKING WITH DEVON HE ADVISED THAT KING WAS ENTERING A VEHICLE IN THE AREA. OFC BATSON AND CPL KUCZENSKI WERE ABLE TO PERFORM A TRAFFIC STOP ON THE VEHICLE THAT KING WAS A PASSENGER IN. THE TRAFFIC STOP WAS IN THE AREA OF S DIVISION ST/DECATUR AVE. THE VEHICLE WAS BEING OPERATED BY KING'S GIRLFRIEND CHRISTINE WASHINGTON, AND WAS A RED DURANGO GA TAG AEA8365. AT THIS TIME KING WAS DETAINED FOR THE INVESTIGATION. DEVON DID POSITIVELY IDENTIFY KING AS THE SUBJECT WHO ASSAULTED THEM WITH THE WEAPON. 638 DECATUR AVE WAS ONLY APPROX 200 FEET

FROM WHERE OFC BATSON AND CPL KUCZENSKI PERFORMED THE TRAFFIC STOP

AT THIS TIME A ONE ON ONE IDENTIFICATION WAS COMPLETED WITH PATTRICK, AND CALVA. BOTH SUBJECTS ADVISED THEY DID NOT WANT TO BE TRANSPORTED IN A POLICE CAR SO OFFICERS LET THE SUBJECTS BE DRIVEN IN SEPARATE PERSONAL VEHICLES TO THE AREA OF WHERE KING WAS BEING DETAINED. PATTRICK, AND CALVA DROVE BY THE AREA AND THEN MET OFC CALHOUN 1152, AT THE COUNTRY FOOD STORES. OFC CALHOUN ADVISED ME VIA RADIO THAT PATTRICK MADE A POSITIVE IDENTIFICATION ON KING, HOWEVER CALVA WAS NOT SURE.

CALVA, PATTRICK AND WOOLFORD DID COMPLETE WRITTEN STATEMENT FOR THE INCIDENT WHICH WILL BE PLACED IN THE CASE FILE FOR REVIEW.

OFC CALHOUN ADVISED THAT HE DID LOCATE A GRAY IN COLOR ARMADA IN THE AREA OF JOHNSON ST/DECATUR ST. OFC CALHOUN ADVISED THAT THIS VEHICLE HOOD WAS WARM TO THE TOUCH. A REGISTRATION CHECK OF THE VEHICLE REVELED IT WAS REGISTERED TO WASHINGTON. OFFICERS GAINED A CONSENT SEARCH OF THE VEHICLE FROM WASHINGTON. WHILE SEARCHING THE VEHICLE CPL KUCZENSKI LOCATED A 12 GAUGE SHOTGUN SHELL IN THE MIDDLE CONSOLE OF THE VEHICLE.

AT THIS TIME BASED ON THE EYEWITNESS ACCOUNTS AND THE LOCATION OF THE SHOTGUN SHELL IN THE VEHICLE WHICH KING FLED THE AREA FROM KING WAS PLACED UNDER ARREST FOR FIRST DEGREE ASSAULT AND OTHER RELATED CHARGES.

KING WAS TRANSPORTED TO THE SALISBURY POLICE DEPARTMENT BY OFC BATSON. I THEN RESPONDED TO THE SALISBURY POLICE DEPT AND SPOKE WITH KING.

[3] CONFRONT THE VEHICLE WITH THE FOUR ABOVE MENTIONED SUBJECTS IN IT; HOWEVER HE DID NOT HAVE A SHOTGUN. KING ADVISED THAT HE HAD A LONG STEEL PIPE BUT DID NOT USE IT. KING ADVISED THAT THERE WAS A PHYSICAL ALTERCATION THROUGH THE WINDOW OF THE VEHICLE; HOWEVER NO SUBJECTS RECEIVED ANY INJURIES.

KING WAS THEN TRANSPORTED TO WCDC FOR PROCESSING.

OTHER OFFICERS FROM THE SALISBURY POLICE DEPT DID COMPLETE SUPPLEMENTS FOR THIS INCIDENT, IN THE SALISBURY CIS SYSTEM.

IT SHOULD BE NOTED THAT THIS WHOLE INCIDENT STEMS FROM A FIGHT THAT OCCURRED ALMOST FIVE MONTHS AGO BETWEEN THE PARTIES.

ALSO NO ITEMS WERE TAKEN FROM ANY OF THE VICTIMS OR REQUESTED BY KING AT ANY TIME.

ALL ABOVE EVENTS OCCURRED IN SALISBURY WICOMICO COUNTY MARYLAND.

COURT COPY

I SOLEMNLY AFFIRM UNDER THE PENALTIES OF PERJURY THAT THE MATTERS AND FACTS SET FORTH IN THE FOREGOING DOCUMENT ARE TRUE TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF		
DATE 04/10/2009		ARRESTING OFFICER /s/
AGENCY DE	SUB-AGENCY SP6	ID NO. 3115

PROBABLE CAUSE CHARGES # 1-12

LACK OF PROBABLE CAUSE CHARGES #

I HAVE REVIEWED THE STATEMENT OF CHARGES AND HAVE DETERMINED THAT ☒ THERE IS PROBABLE CAUSE TO DETAIN THE DEFENDANT ☐ THERE IS NOT PROBABLE CAUSE TO DETAIN THE DEFENDANT AND I HAVE ACCORDINGLY RELEASED HIM ON HIS OWN RECOGNIZANCE		
DATE 04-10-09	JUDICIAL OFFICER /s/	COMMISSIONER ID NO 2094

REPLY BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
FEB 19 2013
OFFICE OF THE CLERK

No. 12-207

IN THE
Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

ALONZO JAY KING, JR.,
Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

REPLY BRIEF OF PETITIONER

DOUGLAS F. GANSLER
Attorney General of Maryland

KATHERINE WINFREE
Chief Deputy Attorney General

BRIAN S. KLEINBORD*
ROBERT TAYLOR, JR.

MARY ANN RAPP INCE
DANIEL J. JAWOR
CARRIE J. WILLIAMS
Assistant
Attorneys General

Office of the Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6435
bkleinbord@oag.state.md.us
Counsel for Petitioner
**Counsel of Record*

Library of Congress
Law Library

TABLE OF CONTENTS

REPLY ARGUMENT. 1

A. King concedes that the test for Fourth Amendment reasonableness requires neither a warrant nor individualized suspicion when the privacy interest implicated by a search is minimal — which is the case here.. 1

B. Balancing the interests confirms the Fourth Amendment reasonableness of a search undertaken under the DNA Collection Act.. 6

1. King concedes that the collection of DNA from convicted offenders is constitutional, but mistakenly purports to draw a Fourth Amendment distinction between convicted offenders and arrestees based on the presumption of innocence. 7

2. King overstates his privacy interest in his non-coding loci. 9

3. The State has a significant interest in collecting DNA profiles from arrestees.. 10

CONCLUSION. 14

TABLE OF AUTHORITIES

Cases:

Bell v. Wolfish, 441 U.S. 520 (1979) 8

Brown v. Texas, 443 U.S. 47 (1979). 2

Chandler v. Miller, 520 U.S. 305 (1997).. 3

City of Indianapolis v. Edmond,
531 U.S. 32 (2000).. 4

Delaware v. Prouse, 440 U.S. 648 (1979) 2, 5

Ferguson v. City of Charleston,
532 U.S. 67 (2001).. . . . . 4, 6

Mich. Dep't. of State Police v. Sitz,
496 U.S. 444 (1990).. 6

New Jersey v. T. L. O.,
469 U.S. 325 (1985) . . . . . 1, *passim*

Samson v. California,
547 U.S. 843 (2006) . . . . . 1, *passim*

Skinner v. Ry. Labor Executives' Ass'n,
489 U.S. 602 (1989) . . . . . 1, *passim*

State v. Raines, 383 Md. 1 (2004) . . . . . 7, *passim*

United States v. Knights,
534 U.S. 112 (2001) . . . . . 3, *passim*

United States v. Martinez-Fuerte,
428 U.S. 543 (1976) 5, 6

Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008) 10

Whalen v. Roe, 429 U.S. 589 (1977) 10

Wyoming v. Houghton, 526 U.S. 295 (1999) 7

Constitutional Provisions:

United States Constitution:

Amendment IV . . . . . 1, *passim*

Statutes:

Annotated Code of Maryland,
Public Safety Article:

2-505 9

2-512 9

Miscellaneous:

Md. Code Regs. 29.05.01.01 *et seq.* 9

Sara H. Katsanis & Jennifer K. Wagner, *Characterization of the Standard and Recommended CODIS Markers*, 58 J. Forensic Sci. s169 (January 2013) 9

Jennifer L. Doleac, *The Effects of DNA Databases on Crime*, University of Virginia 2012. 12

Katie Sepich Enhanced DNA Collection Act of 2012. 12

REPLY ARGUMENT

THE COLLECTION OF IDENTIFYING DNA INFORMATION AFTER A LAWFUL ARREST IS REASONABLE.

A. King concedes that the test for Fourth Amendment reasonableness requires neither a warrant nor individualized suspicion when the privacy interest implicated by a search is minimal — which is the case here.

King argues that "a search ordinarily requires a warrant and probable cause," a principle, he says, that "disposes of this case." (Respondent's Br. at 20). But not even King subscribes to this oversimplified disposition of the issues. Quite the contrary, he expressly concedes in his brief that a warrant and "individualized suspicion" are but "presumptive requirements," with which this Court will dispense when, "for instance," the "individual challenging the conduct is entitled only to a diminished expectation of privacy[.]" (Respondent's Br. at 39) (citing *Samson v. California*, 547 U.S. 843, 852 (2006)).

The concession is well-founded. The Court has, in its own words, "made clear" that "a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989). Individualized suspicion is not required when "the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field."'" *New Jersey v. T.L.O.*, 469

U.S. 325, 342 n.8 (1985) (quoting *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979)). In this context, "other safeguards" include statutes, regulations, and governmental policies that fulfill the spirit, if not the form, of a warrant to "protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents." *Skinner*, 489 U.S. at 621-22. When "the circumstances justifying [the search] and the permissible limits of such intrusions are defined narrowly and specifically in the regulations that authorize them," " a warrant would do little to further" this essential purpose. *Id.* at 622.[1] "[I]n light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate." *Id.* When these are the circumstances under which a search has occurred, this Court has not allowed an "important governmental interest furthered by the intrusion [to] be placed in jeopardy by a requirement of individualized suspicion[.]" *Id.* at 624.

Although both *T.L.O.* and *Skinner* also happened to involve governmental interests deemed to stand apart from criminal law enforcement, and are, for that

---

[1] *See also Brown v. Texas*, 443 U.S. 47, 51 (1979) ("the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, *or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limits on the conduct of individual officers*") (emphasis added).

reason, sometimes referred to as "special-needs" cases, *Samson* makes clear that the reasonableness test that those cases espouse is not limited to a special-needs case. The test, if satisfied, may apply in the context of criminal law enforcement.

Samson involved the warrantless, suspicionless search of a parolee's person on a public street. To determine the Fourth Amendment reasonableness of this search, the Court invoked what it called the "'general Fourth Amendment approach,'" which looks to the "'totality of the circumstances.'" 547 U.S. at 848 (citing *United States v. Knights*, 534 U.S. 112, 120 (2001)). "Whether a search is reasonable 'is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Id.* (citing *Knights*, 534 U.S. at 118-19). To the question whether a warrant based on probable cause was presumptively required absent "special needs," came the clear answer that

> although this Court has only sanctioned suspicionless searches in limited circumstances, namely, programmatic and special needs searches, we have never held that these are the only limited circumstances in which searches absent individualized suspicion could be "reasonable" under the Fourth Amendment.

Samson, 547 U.S. at 855 n.4.[2]

---

[2]In light of this explanation, King's extensive reliance on three cases preceding *Samson* — namely, *Chandler v. Miller*, 520

True to these words, the *Samson* Court in fact applied the test espoused by *T.L.O.* and *Skinner*. Beginning with an assessment of the minimal privacy interests implicated by the search, the Court noted that as a parolee, Samson occupied a position on a "continuum" of state supervision that was somewhere between probation (as in *Knights*) and actual imprisonment. This level of supervision meant that Samson's reasonable expectations of privacy, while not entirely extinguished, were lowered. *Id.* at 850. The Court then turned to the government's interest in policing parolees, which the Court called "substantial," because of the greater likelihood that parolees would re-offend in the future, an obvious impediment to reintegration with society. *Id.* at 853.

Finally, the Court looked to the presence of "safeguards" that might fulfill the role of a warrant by limiting the discretion of the official in the field. *Id.* at 856. In this regard, the statute authorizing the warrantless search of Samson prohibited "arbitrary, capricious or harassing" searches, which the Court deemed sufficient to ameliorate the "concern that [the] suspicionless search system gives officers unbridled discretion[.]" *Id.* In the end, the Court concluded that the government's "substantial" interest in reducing recidivism, *id.* at 853, when weighed against a parolee's "severely diminished expectations of privacy," *id.* at 852, meant that the search was "reasonable"

U.S. 305 (1997); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); and *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) — as exemplary of some implicit limit on the application of the reasonableness balancing test to cases involving "special needs" is not correct.

under the Fourth Amendment.

Although more explicit in its doctrinal approach, *Samson* did not really break new ground by applying a balancing test in the field of criminal law enforcement. Take for example the decision in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), which "involve[d] criminal prosecutions for offenses relating to the transportation of illegal Mexican aliens." *Id.* at 545; *see also id.* at 552 ("Interdicting the flow of illegal entrants from Mexico poses formidable law enforcement problems."). The Court approved of the warrantless stop and interrogation at fixed checkpoints of the occupants of automobiles traveling on roadways near the border. The Court noted that it would be "impractical" for the government to attempt to develop "reasonable suspicion" of smuggling or transportation of illegal aliens with regard to individual vehicles, due to the heavy traffic flow on the roads where checkpoints were located. *Id.* at 557.

Further, a "reasonable suspicion" requirement "would largely eliminate any deterrence to the conduct of well-disguised smuggling operations." *Id.* Since the checkpoint procedure significantly limited the discretion of the officers conducting the questioning and provided travelers with visible evidence of the questioner's legal authority, the Court also noted that the intrusion into an individual's legitimate expectation of privacy was fairly limited. *Id.* at 557-59; *see also Prouse*, 440 U.S. at 656-57 (search conducted according to neutral criteria far less intrusive than search apparently conducted at the whim of the searcher). While allowing that "some quantum of individualized suspicion is usually a prerequisite to a

constitutional search or seizure," the Court held that "the Fourth Amendment imposes no irreducible requirement of such suspicion." 428 U.S. at 560-61; *see also Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 450 (1990) (no requirement to show "special need" search before engaging in balancing test); *Ferguson v. City of Charleston*, 532 U.S. 67, 81 n.15 (2001) (acknowledging that warrantless searches for law enforcement purposes may be acceptable even without probable cause when the individuals to be searched "have a lesser expectation of privacy than the public at large").

By parity of reasoning with *Samson*, and even a case like *Martinez-Fuerte*, the test for Fourth Amendment reasonableness in this case requires neither a warrant nor individualized suspicion. The test urged by Maryland is nothing new, and is, in fact, endorsed by King where, as here, the subject of the search has a reduced expectation of privacy, the governmental interests are important, and other safeguards fulfill the function of a warrant. (Respondent's Br. at 39) (citing *Samson*, 547 U.S. at 852).

B. Balancing the interests confirms the Fourth Amendment reasonableness of a search under the DNA Collection Act.

King argues that even if the Court were to dispense with the probable cause and warrant requirements, the collection of his DNA was not reasonable. His argument heavily depends on an insistence that people who have been arrested and charged with serious

crimes are identical, under the Fourth Amendment, to people who have not been arrested and charged with anything. This is not now and never has been the law.

1. *King concedes that the collection of DNA from convicted offenders is constitutional, but mistakenly purports to draw a Fourth Amendment distinction between convicted offenders and arrestees based on the presumption of innocence.*

In *State v. Raines*, 383 Md. 1 (2004), the Court of Appeals of Maryland considered the same statute when its application to convicted felons was challenged. Applying the balancing test used by this Court in *Knights* and *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999), the court found that "the primary purpose of the Act [is] to identify individuals involved in crime (including the vindication of those falsely convicted)[.]" 383 Md. at 24. Moreover, "the limited intrusion applies, not to members of the general public . . . but only to a certain class of convicted criminals." *Id.* at 25. Noting the provisions of the statute which prohibit unauthorized use of DNA samples, the court observed that "the only information obtained from the DNA linked to the individual pursuant to the Act is the DNA identity of the person being tested. The DNA profile thus serves the purpose of increasing the efficiency and accuracy in identifying individuals within a certain class of convicted criminals." *Id.* The court called such identifying profiles "akin to . . . a fingerprint[,]" and held that offenders "have little, if any, expectation of privacy in their identity" and that the collection of DNA "whose primary purpose is to

identify individuals with lessened expectations of privacy[] is totally distinguishable from [a] search of ordinary individuals for the purpose of gathering evidence against them in order to prosecute them for the very crimes that the search reveals." *Id.* (footnote omitted).

The *Raines* court held that the "minimal" intrusion of a buccal swab was less invasive than the search of a home in *Knights* and upheld the collection under the Fourth Amendment. *Id.* at 21. King and his amici would appear to agree with this analysis when they concede that the warrantless search of a person after conviction is allowed under the Fourth Amendment. (Respondent's Br. at 48).

With this concession, King's argument collapses. The operation of the statute is the same with regard to arrestees and convicted offenders. The only way to reach a different conclusion in this case is through a finding that people arrested and charged with a qualifying crime of violence do not have a "lessened expectation of privacy" in their identities. *Raines*, 383 Md. at 25. King would have this Court so find based on the same mistaken reasoning of the Court of Appeals below, that the presumption of innocence buoys an arrestee's expectation of privacy in his identity, so that it remains equivalent to any member of the public at large. He thus argues, "[w]hen it comes to the government's authority to conduct searches for investigative purposes, . . . an arrestee is presumed to be innocent, and stands in the same position as an ordinary citizen[.]" (Respondent's Br. at 26). Of course, this argument cannot be reconciled with this Court's precedents, particularly *Bell v. Wolfish*, 441

U.S. 520 (1979). (Petitioner's Br. at 18-21). In fact, King does not even try.

2. *King overstates his privacy interest in his non-coding loci.*

King further argues that a DNA profile is not simply identifying information because "our DNA is a blueprint[.]" (Respondent's Br. at 45). This is an incorrect analogy, because a blueprint defines exact physical specifications, while the human genome conveys only generalities. It also ignores the distinction between the entire human genome and the tiny, non-coding fraction of it contained in a standard CODIS profile, which reveals nothing about the person who contributed the profile save his or her sex. Sara H. Katsanis & Jennifer K. Wagner, *Characterization of the Standard and Recommended CODIS Markers*, 58 J. Forensic Sci. s169 (Jan. 2013). The State can and does analyze only that limited identifying information presented from FBI-approved reagents and software. Md. Code Regs. 29.05.01.01, *et seq*. (2012). Thus, the fact that the entire human genome – including non-coding loci – contains more detailed information which could, conceivably, be used to discern information about a person's general physical characteristics, simply is not relevant to the issue before this Court, because the State does not, and legally cannot, gather this sort of information. Md. Code Ann., Pub. Safety Art. § 2-505(b), § 2-512 (LexisNexis 2011 Repl. Vol.) When King's amicus refers to "[t]he broad discretion to rummage through an arrestee's genome" under the Act (Amicus Br. of Public Defender Service for the District of Columbia at 11), it is engaging in fantasy. No such

"rummaging" exists.

With respect to the 13 loci that the State does examine, King does not contend that they reveal any medically sensitive information, and they do not. (*See* Amicus Br. of Genetics, Genomics and Forensic Science Researchers at 36). Instead, he predicts that "scientific advances *may* allow additional personal information to be gleaned from" a CODIS profile. (Respondent's Br. at 46) (emphasis added). If and when science advances as King can only speculate, there will be time enough for courts to address it. But, a reviewing court is bound by the statute as it exists and as it is actually applied in the here and now. A court "must deal with the case in hand and not with imaginary ones[.]" *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 455 (2008) (citation and quotation omitted); *see also Whalen v. Roe*, 429 U.S. 589, 605-06 (1977) (assuming law's privacy restrictions will be followed absent evidence to the contrary). There is no evidence that officials in Maryland, or anywhere else, are improperly analyzing, storing, or disseminating "genetic" information about arrestees or convicted offenders.

3. *The State has a significant interest in collecting DNA profiles from arrestees.*

As discussed in its opening brief, the State has a significant interest in collecting identifying DNA profiles from arrestees. The statute expressly spells out a number of legitimate state goals advanced by the legislation. The Court of Appeals, in *Raines*, identified others. At the end of the day, King himself presents

the best evidence of one of the legitimate state interests being advanced by the limited, systematic collection of identifying DNA profiles from arrestees: the name of the violent rapist who left behind his identifying DNA profile in 2003 was discovered when crime scene evidence was compared to King's DNA profile collected six years later. Before this case, King had never been convicted of a felony, and so absent the amendments to the DNA Collection Act, the DNA evidence he left at the scene of the 2003 rape might never have been linked to a specific individual.

King complains in his brief that there is insufficient evidence of "the efficacy of the expansion of the Maryland Act to arrestees." (Respondent's Br. at 49). But he does not venture a specific number as to how many rapists, murderers, and other criminals must be identified before a court may find that the State has advanced a legitimate interest. Since this Court's July, 2012 stay of the Court of Appeals' opinion and mandate in this case, allowing the State to resume collecting DNA profiles from qualified arrestees, the State has had 28 matches to unsolved crimes from new arrestee samples, including rapes, burglaries, assaults, and homicides. The matches have been to crimes committed in Maryland, Pennsylvania, Delaware, Florida, and New York. The State of California found that prior to the advent of arrestee profiling, its DNA database was helpful in about 35 percent of cases where unknown DNA samples were recovered. After arrestee profiling was instituted, that figure increased to nearly 68 percent. (Amici Br. of California, *et al.*, at 8-9).

The expansion of DNA databases to include more

known samples, moreover, has been shown to reduce crime rates overall, and at a lower cost than simply increasing incarceration rates or sentences.[3] The addition of samples from those charged with serious felonies has been projected to decrease murders by more than three percent and rapes by over six percent. Jennifer L. Doleac, *The Effects of DNA Databases on Crime*, University of Virginia 2012 (working paper, publication forthcoming) (available at http://www.batten.virginia.edu/content/2013-001-effects-dna-databases-crime-jennifer-doleac-860) (last visited Feb. 15, 2013). Thus, the various legislatures that have adopted DNA collection statutes have done so to further significant governmental interests in, for example, identifying people in custody, making proper decisions regarding bail and supervision, identifying the donors of previously recovered crime scene evidence, and properly sentencing recidivists.[4] If the

---

[3]Thus on January 10, 2013, the President signed into law the Katie Sepich Enhanced DNA Collection Act of 2012, which provides grants to states to establish or broaden arrestee DNA collection programs. 112 P.L. 252, 126 Stat. 2407 (2013).

[4]The amici brief submitted by California on behalf of the States — joined by every other state in the union, the District of Columbia, and Puerto Rico — provides striking examples of pretrial supervision determinations affected by arrestee DNA testing. In one California case, Octavio Castillo was arrested on a stolen credit card charge and released on his own recognizance. When testing of Castillo's DNA sample taken on arrest revealed a match to the profile from an unsolved kidnapping and sodomy case, authorities revoked Castillo's bond, he was detained pending trial, and subsequently convicted. (Amici Br. of California *et al.*, at 11-12). In another case, Shelby Glenn Shamblin was arrested for drug offenses in 2010. Viewed by authorities as a low-level

interests themselves are significant, it is not the proper role of a reviewing court to second-guess the efficacy of a particular policy. But indeed the success that these programs have enjoyed nationwide indicates that not only are the interests advanced by the laws important, but that the laws are successfully achieving those policy goals.

---

drug offender, Shamblin was granted a diversion in lieu of prosecution. Two months later, Shamblin's arrestee DNA sample revealed a match to an unsolved rape and murder case dating back to 1980. Based on that match, Shamblin was arrested, his diversion was terminated, and he is now scheduled to stand trial on both the drug charges and the rape and murder charges. (*Id.* at 12).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals of Maryland should be reversed and the constitutionality of the Act affirmed.

Respectfully submitted,

Douglas F. Gansler
Attorney General of Maryland

Katherine Winfree
Chief Deputy Attorney General

Brian S. Kleinbord *
Robert Taylor, Jr.
Assistant Attorneys General

Office of the Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6435
bkleinbord@oag.state.md.us

Counsel for Petitioner

*Counsel of Record
February 19, 2013

AMICUS CURIAE BRIEF

No. 12-207

In the Supreme Court of the United States

STATE OF MARYLAND, PETITIONER

v.

ALONZO JAY KING, JR.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ELAINE J. GOLDENBERG
Assistant to the Solicitor General
ROBERT A. PARKER
CHRISTOPHER J. SMITH
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the collection and analysis of DNA from persons arrested and charged with serious crimes is reasonable under the Fourth Amendment to the Constitution.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 8
Argument:
The collection and analysis of an arrestee's DNA to generate an identification profile is reasonable under the Fourth Amendment 11
A. The reasonableness of DNA collection and analysis should be assessed through a balancing of interests 11
B. The privacy interest of an arrestee in avoiding disclosure of DNA identification information is minimal 14
C. States and the federal government have a strong interest in obtaining DNA identification profiles from arrestees 25
D. The government's interests outweigh the arrestee's 31
Conclusion 34

TABLE OF AUTHORITIES

Cases:

Albright v. *Oliver*, 510 U.S. 266 (1994) 15
Anderson v. *Commonwealth*, 650 S.E. 2d 702 (Va. 2007) 20
Bell v. *Wolfish*, 441 U.S. 520 (1979) 13, 14, 15, 17, 28, 29
Boroian v. *Mueller*, 616 F.3d 60 (1st Cir. 2010) 24
Camara v. *Municipal Court*, 387 U.S. 523 (1967) 13, 33
City of Indianapolis v. *Edmond*, 531 U.S. 32 (2000) 32
City of Ontario v. *Quon*, 130 S. Ct. 2619 (2010) 26
County of Riverside v. *McLaughlin*, 500 U.S. 44 (1991) 15

Cases—Continued: Page

Cupp v. *Murphy*, 412 U.S. 291 (1973) 18
Davis v. *Mississippi*, 394 U.S. 721 (1969) 16
Delaware v. *Prouse*, 440 U.S. 648 (1979) 33
District Atty's Office for Third Judicial Dist. v. *Osborne*, 557 U.S. 52 (2009) 26, 29, 30
Dow Chem. Co. v. *United States*, 476 U.S. 227 (1986) 25
Florence v. *Board of Chosen Freeholders*, 132 S. Ct. 1510 (2012) 13, 15, 28
Garcia v. *Texas*, 131 S. Ct. 2866 (2011) 25
Griffin v. *Wisconsin*, 483 U.S. 868 (1987) 15, 28, 32
Hayes v. *Florida*, 470 U.S. 811 (1985) 20
Hiibel v. *Sixth Judicial Dist. Court*, 542 U.S. 177 (2004) 25
INS v. *Delgado*, 466 U.S. 210 (1984) 25
Illinois v. *Lafayette*, 462 U.S. 640 (1983) 13, 16, 26, 33
Illinois v. *Lidster*, 540 U.S. 419 (2004) 32
Illinois v. *McArthur*, 531 U.S. 326 (2001) 12
Johnson v. *Quander*, 440 F.3d 489 (D.C. Cir.), cert. denied, 549 U.S. 945 (2006) 24
Kentucky v. *King*, 131 S. Ct. 1849 (2011) 12
Maryland v. *Wilson*, 519 U.S. 408 (1997) 13
Michigan Dept. of State Police v. *Sitz*, 496 U.S. 444 (1990) 14
NASA v. *Nelson*, 131 S. Ct. 746 (2011) 23
National Treasury Empls. Union v. *Von Raab*, 489 U.S. 656 (1989) 23
New Jersey v. *T.L.O.*, 469 U.S. 325 (1985) 11, 13, 15
Pennsylvania v. *Mimms*, 434 U.S. 106 (1977) 11
Samson v. *California*, 547 U.S. 843 (2006) 8, 11, 13, 14, 27
Schmerber v. *California*, 384 U.S. 757 (1966) 12, 13

Cases—Continued: Page

Skinner v. *Railway Labor Execs' Ass'n*, 489 U.S. 602 (1989) 13, 14, 18, 24, 33
Smith v. *United States*, 324 F.2d 879 (D.C. Cir. 1963), cert. denied, 377 U.S. 954 (1964) 16
Terry v. *Ohio*, 392 U.S. 1 (1968) 11, 12, 15, 18
United States v. *Amerson*, 483 F.3d 73 (2d Cir.), cert. denied, 552 U.S. 1042 (2007) 14
United States v. *Edwards*, 415 U.S. 800 (1974) 24
United States v. *Karo*, 468 U.S. 705 (1984) 25
United States v. *Kelly*, 55 F.2d 67 (2d Cir. 1932) 16, 26, 33
United States v. *Kincade*, 375 F.3d 813 (9th Cir. 2004), cert. denied, 544 U.S. 924 (2005) 29, 30
United States v. *Knights*, 534 U.S. 112 (2001) ..... *passim*
United States v. *Martinez–Fuerte*, 428 U.S. 543 (1976) 12
United States v. *Mitchell*, 652 F.3d 387 (3d Cir. 2011), cert. denied, 132 S. Ct. 1741 (2012) ..... *passim*
United States v. *Robinson*, 414 U.S. 218 (1973) 12, 15
United States v. *Salerno*, 481 U.S. 739 (1987) 15, 28
United States v. *Sczubelek*, 402 F.3d 175 (3d Cir. 2005), cert. denied, 548 U.S. 919 (2006) 26
Vernonia Sch. Dist. 47J v. *Acton*, 515 U.S. 646 (1995) 11, 16, 23, 27
Winston v. *Lee*, 470 U.S. 753 (1985) 18
Wyoming v. *Houghton*, 526 U.S. 295 (1999) 11

Constitution, statutes, regulations and rules:

U.S. Const. Amend. IV 1, 8, 14, 24
The Debbie Smith Act of 2004, Pub. L. No. 108-405, Tit. II, § 203(f), 118 Stat. 2271 3

Statutes, regulations and rules—Continued: Page

Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 14131 *et seq.* 2
42 U.S.C. 14131 *et seq.* 2
42 U.S.C. 14131 3
42 U.S.C. 14132(a) 1
42 U.S.C. 14132(b) 22
42 U.S.C. 14132(b)-(c) 3
42 U.S.C. 14132(b)(3)-(c) 5
42 U.S.C. 14132(c) 20, 22
42 U.S.C. 14132(d)(1) 5
42 U.S.C. 14133 3
42 U.S.C. 14133(c) 5
42 U.S.C. 14135(a)(1) 3
42 U.S.C. 14135a 5
42 U.S.C. 14135a(a)(1)(A) 1, 5
42 U.S.C. 14135a(c)(2) 3, 22
42 U.S.C. 14135e(a)-(c) 3
42 U.S.C. 14135e(c) 5, 22
18 U.S.C. 3142(c) 15
18 U.S.C. 3142(g) (2006 & Supp. V 2011) 27
18 U.S.C. 3145 28
28 U.S.C. 531 (Note) 22
Md. Code Ann., Crim. Law § 14-101 (LexisNexis 2012) 4
Md. Code Ann., Crim. Proc. § 5-202 (LexisNexis Supp. 2012) 15
Md. Code Ann., Pub. Safety (LexisNexis 2011):
§ 2-501 3
§ 2-502(c)(3) 4
§ 2-504 5

Statutes, regulations and rules—Continued: Page

§ 2-504(a)(3) 3
§ 2-504(c) 4
§ 2-504(d) 4
§ 2-508 4
§ 2-511 5
§ 2-512 ..... 4, 20, 22
Md. Code Ann., Pub. Safety § 2-510 (LexisNexis Supp. 2012) 4
28 C.F.R.:
Section 28.11 22
Section 28.12 ..... 5, 22
Section 28.12(b) 1, 5
Md. Rule:
Rule 4-216.1(c) 28
Rule 4-216(f) 28
Rule 4-216(g) 15

Miscellaneous:

Bureau of Justice Statistics, Federal Justice Statistics, 2009 (Dec. 2011), at 10 (Table 8) 30
Bruce Budowle et al., *Population Data on the Thirteen CODIS Core Short Tandem Repeat Loci*, 44 J. Forensic Sci. 1277 (1999) 2
John M. Butler:
Advanced Topics in Forensic DNA Typing: Methodology (Acad. Press 2012) 20
Genetics and Genomics of Core STR Loci Used in Human Identity Testing, 51 J. Forensic Sci. (Mar. 2006) 20

Miscellaneous—Continued: Page

151 Cong. Rec. S13,756-13,758 (daily ed. Dec. 16, 2005) 30

DNA leads to suspect in 3 slayings in Spokane area 22 years ago, Seattle Times (Nov. 20, 2012) 30

Jules Epstein, *"Genetic Surveillance"—The Bogeyman Response to Familial DNA Investigations*, 2009 U. Ill. J.L. Tech. & Pol'y 141 (2009) 18

FBI:

CODIS—Expungement Policy, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis_expungement (last visited Dec. 28, 2012) 5

CODIS and NDIS Fact Sheet, http://www.fbi.gov/about-us/lab/codis/codis-and-ndis-fact-sheet (last visited Dec. 28, 2012) 19, 20, 26

CODIS-NDIS Statistics, http://www.fbi.gov/about-us/ lab/biometric-analysis/codis/ndis-statistics (last visited Dec. 28, 2012) 31

Integrated Automated Fingerprint Identification System, http://www.fbi.gov/about-us/cjis/fingerprints_ biometrics/iafis/iafis (last visited Dec. 28, 2012) 16

Planned Process and Timeline for Implementation of Additional CODIS Core Loci, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/planned-process-and-timeline-for-implementation-of-additional-codis-core-loci (last visited Dec. 28, 2012) 22

73 Fed. Reg. (Dec. 10, 2008):

pp. 74,933-74,934 30

p. 74,934 ..... 27, 28, 29

pp. 74,934-74,942 26

Miscellaneous—Continued: Page

p. 74,937 20
pp. 74,937-74,938 ..... 3, 22
p. 74,940 21
Memorandum from Eric H. Holder, Jr., Att'y Gen., *DNA Sample Collection from Federal Arrestees and Defendants* (Nov. 18, 2010), http://www.justice.gov/ag/ag-memo-dna-collection111810.pdf (last visited Dec. 28, 2012) 17
H.R. Rep. 900, 106th Cong., 2d Sess. Pt. 1 (2000) 2, 19
Sara H. Katsanis & Jennifer K. Wagner, *Characterization of the Standard and Recommended CODIS Markers*, 57 J. Forensic Sci. 1 (2012) 21
Karen Kreeger, *Reconciling ENCODE and CODIS*, Penn Medicine News (Sept. 18, 2012), http://news.pennmedicine.org/blog/2012/09/reconciling-encode-and-codis.html 21
Nat'l Comm'n on the Future of DNA Evidence, U.S. Dep't of Justice, *What Every Law Enforcement Officer Should Know About DNA Evidence* (1999) 24
Nat'l Research Council, *The Evaluation of Forensic DNA Evidence* (Nat'l Acad. Press 1996) 19
Office of the Inspector General, U.S. Dep't of Justice *Audit of the FBI's Convicted Offender, Arrestee, and Detainee DNA Backlog* (Sept. 2011) 28
91 Op. Md. Att'y Gen. 135 (June 20, 2006) 3
John Roman et al., Urban Inst., *The DNA Field Experiment: Cost-Effectiveness Analysis of the Use of DNA in The Investigation of High-Volume Crimes* (2008) 29

Miscellaneous—Continued: Page

Julie Samuels et al., *Collecting DNA From Arrestees: Implementation Lessons*, Nat'l Inst. Just. J. (June 2012), http://www. ncjrs.gov/pdffiles1/nij/238484.pdf 5

Scientific Working Grp. DNA Analysis Methods, *SWGDAM Executive Board Considerations for Claims that the CODIS Core Loci are 'Associated' with Medical Conditions/Diseases* (Sept. 17, 2012), http://www.swgdam.org/SWGDAM_State_v_Abernathy.pdf 2, 21

State DNA Database Laws Qualifying Offenses As of Sept. 2011 (2011), http://www.dnaresource.com/documents/statequalifyingoffenses2011.pdf 5

Peter M. Vallone, *Rapid Forensic DNA Typing: Protocols and Instrumentation* (presentation at Nov. 28, 2012 Forensics@NIST 2012 Meeting), http://www.nist.gov/oles/upload/10_Vallone-rapid-DNA-2.pdf 28

Jennifer K. Wagner, *Out with the "Junk DNA" Phrase*, J. Forensic Sci. (Sept. 2012), http://onlinelibrary.wiley. com/doi/10.1111/j.1556-4029.2012.02252.x/abstract 21

In the Supreme Court of the United States

No. 12-207

STATE OF MARYLAND, PETITIONER

v.

ALONZO JAY KING, JR.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether the collection and analysis of an arrestee's DNA to produce an identification profile is reasonable under the Fourth Amendment. Like 27 other States, Maryland collects DNA samples from arrestees, analyzes the samples for identifying information, and submits those identifiers to the Combined DNA Index System (CODIS), a statutorily authorized national system of "DNA identification records." 42 U.S.C. 14132(a). The United States also "collect[s] DNA samples from individuals who are arrested, facing charges, or convicted" of federal crimes to create an identification record for inclusion in CODIS. 42 U.S.C. 14135a(a)(1)(A); 28 C.F.R. 28.12(b). Accordingly, the United States has a substantial interest in the resolution of this case.

STATEMENT

1. a. In 1994, Congress authorized the FBI to establish an index of certain DNA profiles. See 42 U.S.C. 14131 *et seq.* Pursuant to that authority, the FBI created CODIS, a computer system that allows forensic laboratories all over the country "to exchange and compare DNA profiles electronically." H.R. Rep. No. 900, 106th Cong., 2d Sess. Pt. 1, at 8 (2000) (H.R. Rep. No. 900).

A profile—often called a "DNA fingerprint"—is a record of the number of times specific sequences of genetic material repeat themselves at 13 locations on the DNA molecule. See *United States* v. *Mitchell*, 652 F.3d 387, 400-401 (3d Cir. 2011) (en banc), cert. denied, 132 S. Ct. 1741 (2012).[1] That string of numbers is a powerful tool for identification because of the infinitesimal likelihood (less than one in ten billion) that two individuals who are not identical twins will share the same number of copies of the same material at all 13 loci. See Bruce Budowle et al., *Population Data on the Thirteen CODIS Core Short Tandem Repeat Loci*, 44 J. Forensic Sci. 1277, 1284 (1999). A DNA identification profile, however, is not useful for any other purpose. The 13 loci are found on stretches of DNA that "were purposely selected because they are not associated with any known physical or medical characteristics." H.R. Rep. No. 900, at 27 (letter from Department of Justice appended to

---

[1] Here is an example of a DNA fingerprint: "11,11,12,12,12,13, 10,20,29,30,16,18,12,13,09,11,11,15,23,24,06,9.3,08,08,17,19."Scientific Working Grp. DNA Analysis Methods, *SWGDAM Executive Board Considerations for Claims that the CODIS Core Loci are 'Associated' with Medical Conditions/Diseases* 2 (Sept. 17, 2012), http://www.swgdam.org/SWGDAM_State_v_Abernathy.pdf.

House Report); see 73 Fed. Reg. 74,937-74,938 (Dec. 10, 2008).[2]

CODIS contains DNA identification profiles from crime-scene evidence, unidentified remains, and missing persons' relatives. See 42 U.S.C. 14132(a). It also contains such information from federal and state DNA collection programs. See *ibid.*; 42 U.S.C. 14135(a)(1) (authorizing grants to States for DNA analysis); 42 U.S.C. 14131, 14132(b)-(c), 14133, 14135a(c)(2), 14135e(a)-(c) (detailing quality assurance standards, limitations on use of CODIS, and prohibitions on disclosure of DNA information, as well as criminal and other penalties for non-compliance). The DNA identification profiles in CODIS are associated with information about the originating laboratory, but not with names or other personal identifiers. See Pet. App. 66a.

b. In 1994, Maryland enacted the DNA Collection Act, authorizing the collection of DNA samples from certain convicted offenders for the purpose of creating DNA identification profiles. Pet. App. 17a-18a. That law was intended to "allow the State to participate in [the] nationwide DNA data base network maintained by the [FBI]," 91 Op. Md. Att'y Gen. 135 (June 20, 2006), and to assist in investigation of crimes, see Md. Code Ann., Pub. Safety § 2-505.

Effective January 1, 2009, Maryland expanded the Act to cover people arrested for a crime of violence, an attempted crime of violence, a burglary, or an attempted burglary. Md. Code Ann., Pub. Safety §§ 2-501, 2-504(a)(3); see Pet. App. 17a n.13. A "crime of violence" is defined to include murder, rape, first-degree assault,

---

[2] Any change to the "core genetic markers" used in CODIS requires prior notice to Congress. Pub. L. No. 108-405, Tit. II, § 203(f), 118 Stat. 2271.

and other serious offenses. See Md. Code Ann., Crim. Law § 14-101.

When an arrestee is charged and his traditional fingerprints are taken, a trained collector also obtains a DNA sample by using a "buccal swab"—a cotton swab brushed against the inside of the cheek. See Md. Code Ann., Pub. Safety § 2-504(c); Pet. App. 4a-5a. The sample is not analyzed by a laboratory until after the arrestee's first appearance before a judicial officer. See Md. Code Ann., Pub. Safety § 2-504(d).

The analysis is conducted in accordance with "FBI/CODIS standards." Pet. App. 21a; see *id.* at 80a; Md. Code Ann., Pub. Safety § 2-502(c)(3). Accordingly, the laboratory looks only at specified loci that do not "code" for any physical attributes, and it generates only "a numerical representation" of the repeats "at each loc[us]"—the string of numbers that constitutes a DNA fingerprint. Pet. App. 21a-22a.

The DNA fingerprint is then uploaded to CODIS. Pet. App. 21a-22a. If the uploaded information matches a profile derived from crime-scene evidence, authorities have probable cause for a warrant to obtain another DNA identification profile from the suspect, which can be introduced at trial. Md. Code Ann., Pub. Safety § 2-510.

Maryland law restricts the use of a DNA profile and its source sample. Disclosure of DNA information to unauthorized persons, obtaining such information without authorization, and "willfully test[ing] a DNA sample for information that does not relate to the identification of individuals" are crimes punishable by a substantial fine and up to five years in prison. Md. Code Ann., Pub. Safety § 2-512; see *id.* § 2-508. Maryland law also provides for automatic expungement of records and de-

struction of DNA samples when an individual is cleared or pardoned. See *id.* §§ 2-504, 2-511.

c. Twenty-seven other States and the federal government collect DNA from arrestees in order to create DNA identification profiles.[3] See Julie Samuels et al., *Collecting DNA From Arrestees: Implementation Lessons*, Nat'l Inst. Just. J. 19 (June 2012), http://www.ncjrs.gov/pdffiles1/nij/238484.pdf. The laws are generally similar, but some of their details vary. See, *e.g.*, *id.* at 20-21, 23. For example, the federal government, like Maryland, collects DNA samples from arrestees by buccal swab, limits analysis to the creation of DNA identification profiles, safeguards the privacy of those profiles, and penalizes misuse. See, *e.g.*, 42 U.S.C. 14132(b)(3)-(c), 14133(c), 14135a, 14135e(c); 28 C.F.R. 28.12. But unlike Maryland, the federal government collects DNA samples from all of its arrestees, not just those arrested for particular crimes, and may analyze a sample before an arrestee's appearance in court. See 42 U.S.C. 14135a(a)(1)(A); 28 C.F.R. 28.12(b). In addition, unlike Maryland arrestees, federal arrestees who are not convicted must affirmatively request expungement. See 42 U.S.C. 14132(d)(1); FBI, *CODIS–Expungement Policy*, http://www.fbi.gov/about-us/lab/codis/codis_expungement (last visited Dec. 28, 2012).

2. a. On April 10, 2009, respondent was arrested and charged with four counts of first-degree assault and one count of second-degree assault. Pet. App. 2a; J.A. 49. The same day, authorities collected a sample of his DNA through a buccal swab; they also took his fingerprints

---

[3] All 50 States, along with the federal government, take DNA samples from some convicted offenders. See *State DNA Database Laws Qualifying Offenses As of Sept. 2011* (2011), http://www.dnaresource.com/documents/statequalifyingoffenses2011.pdf.

and "other identifying information." J.A. 49; see Pet. App. 4a-5a. A few days later, he appeared before a judicial officer. J.A. 49. At that point, a laboratory analyzed his DNA sample to generate his DNA identification profile. On July 13, 2009, that profile was uploaded to CODIS. Pet. App. 5a-6a; J.A. 72.

On September 16, 2009, respondent entered an *Alford* plea on the charge of second-degree assault—a crime that does not independently trigger DNA collection from a convicted offender under Maryland law. Pet. App. 2a n.2, 4a n.3, 67a & n.34. Respondent was sentenced to four years of imprisonment, with all but 12 months of that sentence suspended. *Id.* at 4a n.3; J.A. 49.

b. Meanwhile, on August 4, 2009, CODIS matched respondent's DNA profile with the DNA evidence collected during a forensic examination of the victim of a 2003 rape. Pet. App. 2a, 6a-7a; J.A. 50. The rapist—a man wearing a hat and a scarf over his face—broke into the Maryland home of a 53-year-old woman, threatened her with a gun, ordered her not to look at him, and raped her while holding the gun to her head. Pet. App. 6a-7a.

On October 13, 2009, a grand jury indicted respondent for the rape. Pet. App. 7a; J.A. 50. On November 18, 2009, the circuit court issued an order authorizing a second buccal swab of respondent. The DNA profile from the second swab once again matched the DNA profile from the rape-kit evidence. Pet. App. 3a, 7a.

Respondent moved to suppress his DNA profile, arguing both that he never gave a DNA sample at all in April 2009 and that collection of DNA from him at that time was unreasonable under the Fourth Amendment.

Pet. App. 8a & n.9; J.A. 45-46, 54, 61. The circuit court denied the motion. Pet. App. 9a-10a; J.A. 50-55, 82.

On July 27, 2010, respondent was convicted of first-degree rape. He was sentenced to life in prison without the possibility of parole. Pet. App. 3a, 10a.

3. Respondent appealed. A divided Maryland Court of Appeals reversed the suppression ruling. Pet. App. 70a.

Applying a "totality of the circumstances balancing test," the court held that respondent "generally has a sufficiently weighty and reasonable expectation of privacy against warrantless, suspicionless searches that is not outweighed by the State's purported interest in assuring proper identification of him." Pet. App. 3a; see *id.* at 11a, 14a-17a, 58a-59a. With respect to respondent's privacy interest, the court deemed the analogy between DNA fingerprints and traditional fingerprints "tenuous"; discounted Maryland's restrictions on use of the "vast genetic treasure map" found in a DNA sample; and relied on an arrestee's presumption of innocence. *Id.* at 61a-63a. With respect to the government's interest, the court gave little weight to the State's "generalized interest" in solving crimes; saw no legitimate need for a DNA sample when the State had identified respondent "confidently through photographs and fingerprints"; and asserted that "DNA collection can wait until a person has been convicted." *Id.* at 3a, 65a-67a. The court held the Maryland DNA Collection Act unconstitutional as applied to respondent. *Id.* at 4a.

Judge Barbera, joined by Judge Wilner, dissented. Pet. App. 72a-85a. The dissent explained that the majority "overinflat[ed] an arrestee's interest in privacy and underestimate[d] the State's interest in collecting arrestee DNA." *Id.* at 73a. The dissenters would have

held that a DNA fingerprint is akin to a traditional fingerprint in light of the legal restrictions on testing of a DNA sample. *Id.* at 76a-83; see *id.* at 80a-81a. In the dissenters' view, balancing the State's interests in "identifying arrestees, solving past crimes, and exonerating innocent individuals" against "the significantly diminished expectation of privacy attendant to taking a buccal swab of an arrestee" yields the "obvious answer" that the search is "reasonable." *Id.* at 83a, 85a.

4. On July 30, 2012, the Chief Justice granted a stay of the judgment, explaining that it "implicates an important feature of day-to-day law enforcement practice in approximately half the States and the Federal Government" and results in "concrete harm to Maryland's law enforcement and public safety interests." Pet. App. 90b-91b.

SUMMARY OF ARGUMENT

The Fourth Amendment permits the government to obtain a DNA sample from a person who has been arrested, but has not yet been convicted of a crime, and to analyze that sample in order to generate an identification profile.

A. The touchstone of the Fourth Amendment is reasonableness, which is assessed by balancing the degree to which a search intrudes on a person's privacy interests against the degree to which it is needed to promote legitimate governmental interests. See *United States* v. *Knights*, 534 U.S. 112, 118-199 (2001). In many contexts, a search is impermissible without individualized suspicion and a warrant. But this Court has held in a variety of circumstances that the results of the balancing test may permit the government to dispense with those conditions—for instance, where the privacy interest at issue is minimal, where the government's purpose

will be frustrated by requiring a warrant, and where alternative safeguards limit the discretion of officers in the field. See, *e.g.*, *Samson* v. *California*, 547 U.S. 843 (2006).

B. DNA fingerprinting is a minimal incursion on an arrestee's privacy interests. Those interests are already much diminished in light of an arrestee's status and the various intrusions and restrictions to which he is subject—and that is particularly true of any interest in preventing law enforcement from obtaining his identifying information. The physical intrusion involved in swabbing the inside of an arrestee's cheek is negligible. And the limited analysis of the DNA sample to obtain a DNA identification profile is also an insignificant intrusion. A DNA profile is only a list of numbers; like a traditional fingerprint, it exposes nothing about a person's physical characteristics, propensities, or medical conditions. Accoringly, neither speculation that a DNA identification profile based on the CODIS criteria might someday reveal such matters, nor the theoretical possibility that government use of DNA samples might someday expand in a manner implicating privacy concerns, plays a proper role in the Fourth Amendment analysis in this case.

C. In contrast, the government's interests in obtaining DNA identification profiles from arrestees are very powerful. First, the government has a strong interest in identifying a person in its custody, including learning his criminal record and whether he is wanted for a crime. DNA fingerprinting serves that interest, and does so more effectively than traditional fingerprinting in certain circumstances. Second, DNA fingerprinting advances the government's interests in making informed decisions about whether to detain or release an arrestee

pending trial, and how to supervise him in either event. It also helps to deter a released person from committing additional crimes in the pretrial period and to ensure that a defendant will actually appear for trial. Finally, the government—and society at large—has an overwhelming interest in solving crimes, which has the concomitant benefit of aiding victims and exonerating anyone wrongly suspected or accused. DNA fingerprinting improves the government's ability to bring offenders to justice, as the facts of this case and others compellingly illustrate.

D. The balancing of interests favors the government; indeed, the government's interests very significantly outweigh an arrestee's interest in avoiding the minimal intrusion of collection of a DNA sample for the limited purpose of creating a DNA fingerprint. In addition, like many of this Court's previous cases approving a warrantless search, this is a case in which requiring a warrant would completely frustrate those interests—a particularly unnecessary result in light of the various safeguards in the law that divest officers of discretion and provide the same specifics that a warrant otherwise would.

The analogy between DNA fingerprinting and traditional fingerprinting of arrestees is compelling. Both are critical to law enforcement, minimally intrusive, and, for the same reasons, a reasonable procedure under all the circumstances.

ARGUMENT

THE COLLECTION AND ANALYSIS OF AN ARRESTEE'S DNA TO GENERATE AN IDENTIFICATION PROFILE IS REASONABLE UNDER THE FOURTH AMENDMENT

A. The Reasonableness Of DNA Collection And Analysis Should Be Assessed Through A Balancing Of Interests

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" and that "no Warrants shall issue, but upon probable cause." The "touchstone" of a Fourth Amendment analysis "is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'" *Pennsylvania* v. *Mimms*, 434 U.S. 106, 108-109 (1977) (per curiam) (quoting *Terry* v. *Ohio*, 392 U.S. 1, 19 (1968)).

This Court determines what is reasonable, and what safeguards may be necessary in a particular context, by balancing the interests at stake in light of "the totality of the circumstances." *Samson* v. *California*, 547 U.S. 843, 848 (2006) (citation omitted). That balancing weighs "'on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *United States* v. *Knights*, 534 U.S. 112, 119 (2001) (quoting *Wyoming* v. *Houghton*, 526 U.S. 295, 300 (1999)); see *id.* at 117-118 (describing balancing as "general Fourth Amendment approach"); *New Jersey* v. *T.L.O.*, 469 U.S. 325, 337 (1985) (stating that "[t]he determination of the standard of reasonableness" requires balancing).

This Court has interpreted the Amendment to incorporate a presumption in favor of a warrant and probable cause to justify a search. See *Vernonia Sch. Dist. 47J* v.

Acton, 515 U.S. 646, 652-653 (1995) ("Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant."); see also *Kentucky* v. *King*, 131 S. Ct. 1849, 1856 (2011) (warrantless search within a home is "presumptively unreasonable"); *Schmerber* v. *California*, 384 U.S. 757, 770 (1966) (same for "intrusions into the human body"). But that procedure is by no means inflexibly required. See, *e.g.*, *United States* v. *Robinson*, 414 U.S. 218-235 (1973) (search incident to arrest); *Terry*, 392 U.S. at 19-22 (protective frisk); *Schmerber*, 384 U.S. at 769-772 (warrantless blood draw of arrested drunk driver). Rather, the Court has held in a variety of circumstances that the balancing of interests permits the government to dispense with a warrant or a requirement of individualized suspicion. See *Knights*, 534 U.S. at 121 ("Although the Fourth Amendment ordinarily requires the degree of probability embodied in the term 'probable cause,' a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable."); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 554-555 (1976).

A search without probable cause or a warrant is particularly likely to be found reasonable when it involves modest intrusions on the individual's privacy; the governmental need is especially great, or especially likely to be frustrated by a warrant requirement; and protections are in place that limit the discretion of officers in the field. See, *e.g.*, *Illinois* v. *McArthur*, 531 U.S. 326, 330-331 (2001) ("When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a war-

rantless search or seizure reasonable."); *Skinner* v. *Railway Labor Execs' Ass'n*, 489 U.S. 602, 623-633 (1989); see also *T.L.O.*, 469 U.S. at 342-343; *Camara* v. *Municipal Court*, 387 U.S. 523, 534-540 (1967).

This Court recently engaged in just that kind of balancing in *Samson* v. *California*, *supra*. The search at issue in *Samson* was a warrantless, suspicionless search of the person of a parolee. See 547 U.S. at 846. The Court applied its "general Fourth Amendment approach" of "examin[ing] the totality of the circumstances" and weighing the various interests at stake. *Id.* at 848 (citation omitted). Because the parolee had "severely diminished expectations of privacy by virtue of [his] status alone," and because the State—which had protections in place against harassment—had a "substantial" interest in supervising parolees, preventing "future criminal offenses," and promoting public safety, the balance favored the government. *Id.* at 851-853, 855 n.4, 856; see *Knights*, 534 U.S. at 119.

The "general Fourth Amendment" approach employed in *Samson* is not limited to cases involving convicted offenders. See, *e.g.*, *Florence* v. *Board of Chosen Freeholders*, 132 S. Ct. 1510, 1516 (2012) (arrestees); *Maryland* v. *Wilson*, 519 U.S. 408, 411-412 (1997) (passengers in traffic stop); *Bell* v. *Wolfish*, 441 U.S. 520, 559-560 (1979) (pretrial detainees); see also *Illinois* v. *Lafayette*, 462 U.S. 640, 643-649 (1983) (assessing a warrantless "inventory search" of a shoulder bag, which was "an incidental administrative step following arrest and preceding incarceration," by balancing interests). Nor, as the *Samson* Court expressly stated, is it limited to cases involving "special needs" beyond the usual need for enforcement of the criminal laws, or to cases involving "programmatic" or administrative searches. See 547

U.S. at 855 n.4 (explaining that the Court has never held that "programmatic and special needs searches" are "the only limited circumstances in which searches absent individualized suspicion could be 'reasonable'"); *Michigan Dept. of State Police* v. *Sitz*, 496 U.S. 444, 450 (1990) (rejecting argument that "a showing of some special governmental need" is required "before a balancing analysis is appropriate").

Maryland unquestionably searched respondent when it obtained his DNA sample and generated a DNA fingerprint. See *Skinner*, 489 U.S. at 616-617. Accordingly, consistent with *Samson* and other precedent, the court below properly engaged in a balancing of private and public interests under the Fourth Amendment. See Pet. App. 58a.[4] It erred, however, in determining that the balancing test favored the arrestee rather than the State.

B. The Privacy Interest Of An Arrestee In Avoiding Disclosure Of DNA Identification Information Is Minimal

1. An arrest based on probable cause significantly reduces an individual's privacy interest and, in particular, sharply diminishes any interest in keeping his identity private. See generally *Samson*, 547 U.S. at 850-851; *Bell*, 441 U.S. at 545-546. The diminished character of that interest must be taken into account in determining "the degree to which" the search at issue "intrudes upon an individual's privacy.'" *Knights*, 534 U.S. at 118-119.

---

[4] The majority of courts upholding laws requiring DNA fingerprinting have also employed that test. See, *e.g.*, *United States* v. *Mitchell*, 652 F.3d 387, 402-403 (3d Cir. 2011), cert. denied, 132 S. Ct. 1741 (2012). A few other courts have upheld such laws on the ground that they serve "special needs." See, *e.g.*, *United States* v. *Amerson*, 483 F.3d 73, 78 (2d Cir.), cert. denied, 552 U.S. 1042 (2007).

By definition, an arrestee "do[es] not enjoy 'the absolute liberty to which every citizen is entitled.'" *Knights*, 534 U.S. at 119 (quoting *Griffin* v. *Wisconsin*, 483 U.S. 868, 874 (1987)). "An arrest is the initial stage of a criminal prosecution" and is "inevitably accompanied by future interference with the individual's freedom of movement." *Terry*, 392 U.S. at 26.

An arrestee is also subject to other serious restrictions and intrusions. See Pet. App. 76a. Law enforcement officers may search an arrestee's person and belongings in his immediate possession, see *United States* v. *Robinson*, 414 U.S. 218, 235 (1973); they may confine him, pending his appearance before a judicial officer, in conditions not conducive to personal privacy, see generally *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 56 (1991); and, before confining him in a jail's general population, they may subject him to a strip search, including the requirement "to lift [his] genitals or cough in a squatting position," see *Florence*, 132 S. Ct. at 1520. If an arrestee is charged with a crime, authorities may detain him before guilt or innocence is established if he is found dangerous or at risk of flight, and may subject him to monitoring techniques designed to ensure prison safety. See *United States* v. *Salerno*, 481 U.S. 739, 748-750 (1987); *Bell*, 441 U.S. at 558. And if he is released pending trial, authorities may impose a variety of conditions, including the requirement that he agree to be searched, wear a tracking device, remain inside a defined area, and abide by a curfew. See, *e.g.*, Md. Rule 4-216(g); Md. Code Ann., Crim Proc. § 5-202; 18 U.S.C. 3142(c); see also *Albright* v. *Oliver*, 510 U.S. 266, 277-279 (1994) (Ginsburg, J., concurring) (explaining that released arrestee facing charges effectively remains in the government's "custody").

Amidst all of those intrusions, an arrestee must also undergo routine booking procedures, including photographing and fingerprinting, designed to reveal his identity and permanently record it. Compare, *e.g.*, *Smith* v. *United States*, 324 F.2d 879, 882 (D.C. Cir. 1963) (Burger, J.) ("[I]t is elementary that a person in lawful custody may be required to submit to * * * fingerprinting as part of routine identification processes."), cert. denied, 377 U.S. 954 (1964), and *United States* v. *Kelly*, 55 F.2d 67, 69-70 (2d Cir. 1932) (Augustus Hand, J.) (same), with *Davis* v. *Mississippi*, 394 U.S. 721, 724-726 (1969) (finding that fingerprinting without probable cause or lawful arrest violated the Fourth Amendment). Authorities use that information to call up an arrestee's criminal record and to determine whether he is wanted for a crime. See, *e.g.*, FBI, *Integrated Automated Fingerprint Identification System*, http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis (last visited Dec. 28, 2012). An arrestee therefore can hardly claim any right to shield his identity from law enforcement.

In light of an arrestee's loss of control over his person in all of those ways, his remaining store of privacy is not large—particularly with respect to information that serves to identify him. Although he retains greater privacy interests than does a convicted offender, his interests are less than those of the person on the street. See *Lafayette*, 462 U.S. at 643-649 (noting "evolution of interests along the continuum from arrest to incarceration"); cf. *Vernonia*, 515 U.S. at 656-657 (finding that students have "a lesser expectation of privacy than members of the population generally" based in part on the various medical examinations and procedures they must undergo (citation omitted)).

That is true regardless of an arrestee's presumption of innocence at trial. The court below placed heavy reliance on that presumption, finding it "critical" to this case. Pet. App. 62a; see *id.* at 29a, 58a-59a ("The State bears the burden of overcoming the arrestee's presumption of innocence."). That reliance was misplaced. This Court has made clear that while "[t]he presumption of innocence * * * allocates the burden of proof in criminal trials," it has "no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." *Bell*, 441 U.S. at 533. The presumption therefore has no bearing on an assessment of an arrestee's privacy interests before trial.[5]

2. The physical collection of DNA from an arrestee is not a significant invasion of privacy. The DNA sample in this case was obtained using a buccal swab—a cotton-tipped stick that resembles a large Q-tip. See Pet. Br. 13; see also Memorandum from Eric. H. Holder, Jr., Att'y Gen., *DNA Sample Collection from Federal Arrestees and Defendants* 2 (Nov. 18, 2010), http://www.justice.gov/ag/ag-memo-dna-collection111810.pdf. The swab is rubbed briefly and gently on the inside of the cheek to absorb genetic material. See Pet App. 5a n.5.

That intrusion is at most a minimal one. The inside of the cheek is readily accessible, visible to others when an individual speaks, yawns, or eats, and accustomed to touching with a toothbrush. Swabbing that area takes

---

[5] As noted, see pp. 4-5, *supra*, Maryland provides for expungement of DNA records if the defendant is not convicted or is pardoned. Contrary to the decision below (Pet. App. 62a-63a), that provision does not elevate an arrestee's privacy interests in his identity (or negate the government's interests, see pp. 25-31, *infra*). An event that triggers expungement cannot be foreseen, and before it occurs, the defendant is subject to the same restrictions as any other arrestee.

only seconds and "involves no penetration of the skin, pain, or substantial inconvenience," Jules Epstein, *"Genetic Surveillance"—The Bogeyman Response to Familial DNA Investigations*, 2009 U. Ill. J.L. Tech. & Pol'y 141, 152 (2009), and no "risk of infection," *Schmerber*, 384 U.S. at 771-772.

This Court has repeatedly described far more invasive or embarrassing procedures as insignificant incursions. For instance, in *Skinner*, *supra*, the Court held that a blood test—which involves piercing a vein with a needle—was not a "significant" intrusion. 489 U.S. at 625 (quoting *Schmerber*, 384 U.S. at 771); see *Winston* v. *Lee*, 470 U.S. 753, 762 (1985). And in *Vernonia School District 47J* v. *Acton*, 515 U.S. 646 (1995), the Court held that when urine collection is not directly observed, "the privacy interests compromised by the process of obtaining the urine sample are * * * negligible." *Id.* at 657-659.

A buccal swab is an even more "negligible" intrusion than either of those methods of collecting a biological sample. See *Skinner*, 489 U.S. at 625 (approving "breath test," which is "even less intrusive" than a blood test because it does not "require piercing the skin and may be conducted safely outside a hospital environment"). Any physical contact may intrude on "cherished personal security." *Cupp* v. *Murphy*, 412 U.S. 291, 295 (1973) (characterizing scraping under fingernails as "'severe, though brief, intrusion'" (quoting *Terry*, 392 U.S. at 24-25)). But a buccal swab is quite low on the scale of contacts. Accordingly, it barely registers in the Fourth Amendment balance—especially for an arrestee, who has diminished privacy interests at the moment of collection.

3. The analysis of the genetic material collected by means of the swab also does not result in anything more than a minimal invasion of the arrestee's privacy. Because the analysis is strictly limited, and gives law enforcement access only to a string of numbers, it reveals nothing private about the arrestee at all. The result is equivalent to a fingerprint—a form of arrestee identification that has been routinely used by law enforcement in this country for a century.

a. A DNA fingerprint is nothing more than a long list of numbers that reflects the repeated occurrence of particular genetic material at each of 13 loci. Those carefully selected loci are in highly variable regions of the DNA to better differentiate between people; in addition, they do not encode protein sequences—that is, they do not "code" for physical traits, propensities, or susceptibilities. See Pet. App. 80a; H.R. Rep. No. 900, at 27; FBI, *CODIS and NDIS Fact Sheet*, http://www.fbi.gov/about-us/lab/codis/codis-and-ndis-fact-sheet (last visited Dec. 28, 2012) (*CODIS and NDIS Fact Sheet*). And the repeats themselves are simply sequences of the nucleobases adenine (A), cytosine (C), guanine (G), and thymine (T) (*e.g.*, GATA or AATG) that recur over a short stretch. One person may have seven and eight repeats at a particular locus, while another has three and four. See *Mitchell*, 652 F.3d at 401. When all 13 loci are taken into account, the probability that the DNA of different people will yield the same string of numbers is "vanishingly small." Nat'l Research Council, *The Evaluation of Forensic DNA Evidence* 47 (Nat'l Acad. Press 1996).

DNA identification profiles stored by CODIS—as Maryland law contemplates—have no identifying information associated with them. CODIS contains the number-string itself and information about the laboratory

that generated it; only in the event of a "hit" in the database can the record ultimately be traced back to a particular arrestee. See *CODIS and NDIS Fact Sheet*.[6]

A DNA fingerprint therefore yields no private information at all. Rather, it is equivalent in a privacy analysis to the pattern of whorls on the tips of the fingers: a "sanitized 'genetic fingerprint[]' that can be used to identify an individual uniquely, but do[es] not disclose an individual's traits, disorders, or dispositions." 73 Fed. Reg. at 74,937; see John M. Butler, *Genetics and Genomics of Core STR Loci Used in Human Identity Testing*, 51 J. Forensic Sci. 253 (Mar. 2006); see also *Hayes* v. *Florida*, 470 U.S. 811, 814-816 (1985) (explaining that fingerprinting does not involve "any of the probing into private life and thoughts that often marks interrogation and search"); John M. Butler, *Advanced Topics in Forensic DNA Typing: Methodology* 228-229 (Acad. Press 2012).[7]

Respondent attempts (Br. in Opp. 15) to undermine the comparison to fingerprints by pointing to research (known as the "ENCODE project") suggesting that the so-called "junk" DNA where the13 loci are located may play a role in the way that other genetic material expresses physical traits. But that research does not indicate that DNA identification profiles actually reveal any

---

[6] Use of CODIS also requires compliance with quality control and privacy restrictions, see 42 U.S.C. 14132(c); *CODIS and NDIS Fact Sheet*, and Maryland law contains its own similar restrictions, see, *e.g.*, Md. Code Ann., Pub. Safety § 2-512.

[7] Many courts have embraced the comparison between DNA fingerprinting and traditional fingerprinting. See, *e.g.*, *Mitchell*, 652 F.3d at 400-401; *Anderson* v. *Commonwealth*, 650 S.E.2d 702, 705 (Va. 2007) (concluding that DNA fingerprinting "is no different in character than acquiring fingerprints upon arrest").

personal information. Even if the loci—a very small subset of all "junk" DNA—are located in an area that has some function in genetic regulation, that does not mean that the number of repeats at a particular locus has any predictive value in determining what that function might be, especially in the absence of additional information about a person's genetic makeup. See Scientific Working Grp. DNA Analysis Methods, *supra*. Thus, a recent study concludes that "[t]he utility of the CODIS profile itself, even in light of the significance of * * * roles of non-coding [genetic material], is limited to identification purposes at this time," since "there is no evidence that any particular repeat genotypes" (the numbers that make up the DNA fingerprint) "are indicative of phenotype" (physical characteristics). Sara H. Katsanis & Jennifer K. Wagner, *Characterization of the Standard and Recommended CODIS Markers*, 57 J. Forensic Sci. 1, 3 (2012) (Katsanis & Wagner); see Karen Kreeger, *Reconciling ENCODE and CODIS*, Penn Medicine News (Sept. 18, 2012), http://news.pennmedicine.org/blog/2012/09/reconciling-encode-and-codis.html (noting that the "recent ENCODE publications" do not "implicate CODIS markers"); see also Jennifer K. Wagner, *Out with the "Junk DNA" Phrase*, J. Forensic Sci. (Sept. 2012), http://onlinelibrary.wiley.com/doi/10.1111/j.1556-4029.2012.02252.x/abstract (stating that it is "appropriate to warn nonscientists" that "imply[ing]" that "the CODIS loci are each or collectively involved in gene expression and are now important for a wide array of traits and conditions" is "unfounded").[8]

---

[8] The FBI is considering whether to expand the number of loci used to generate a DNA fingerprint. The loci under consideration serve the same limited function as the existing 13 loci. Katsanis & Wagner, *supra*, at 1-3. Whether and when such a

In short, the number string does not give rise to any inference about the personal information or characteristics of the person to whom it uniquely belongs. Obtaining those numbers therefore does not meaningfully invade an arrestee's privacy.

b. The court below did not question the extremely limited nature of the information derived from analysis of the core loci. See Pet. App. 61a. It did, however, express fear that by taking a DNA sample the State gained access to a "vast genetic treasure map," since the sample could theoretically be analyzed in other ways. See *ibid.*

That fear is unfounded. Maryland law makes anyone who "willfully test[s] a DNA sample for information that does not relate to the identification of individuals as specified in this subtitle" subject to five years of imprisonment, a fine of up to $5,000, or both, see Md. Code Ann., Pub. Safety § 2-512; the same punishment deters disclosure of information from a DNA fingerprint or the underlying sample, see *ibid.* Similar safeguards apply under federal law. See, *e.g.*, 42 U.S.C. 14132(b), 14133(c) 14135a(c)(2), 14135e(c); 28 C.F.R. 28.11, 28.12; 73 Fed. Reg. at 74,937-74,938.

In addition, generating a DNA identification profile using the designated loci does not incidentally reveal any other information about the genetic material found in a sample. Authorities do not look at all the available genetic information in order to pluck out a string of numbers; rather, they use specific scientific processes

---

change will be implemented is uncertain. See FBI, *Planned Process and Timeline for Implementation of Additional CODIS Core Loci*, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/planned-process-and-timeline-for-implementation-of-additional-codis-core-loci (last visited Dec. 28, 2012); 28 U.S.C. 531 (Note).

that allow them to see *only* the specified string of numbers, while the rest of the "genetic treasure map" remains written in invisible ink. Indeed, "it would be practically impossible to divert the relevant * * * laboratory processes for preparation of CODIS DNA profiles," which involve the use of specific chemical reagents and equipment settings, "so as to extract and misuse genetically sensitive information." 73 Fed. Reg. at 74,940. So far as the United States is aware, that kind of misuse of a DNA sample taken from an arrestee or a convicted offender has never taken place. See *NASA* v. *Nelson*, 131 S. Ct. 746, 761-763 (2011) (explaining that a "'statutory or regulatory duty to avoid unwarranted disclosures' generally allays * * * privacy concerns" (citation omitted)).

This Court has often held that Fourth Amendment analysis in cases involving biological samples should focus only on the use permitted under governing law. For example, in *Vernonia School District*, *supra*, the Court recognized that testing the urine of student athletes could potentially "disclose[]" a variety of facts "concerning the state of the subject's body, and the materials * * * ingested," but deemed it "significant that the tests at issue * * * look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic." 515 U.S. at 658; see also *National Treasury Emps. Union* v. *Von Raab*, 489 U.S. 656, 673 n.2 (1989) (noting that program was limited to analyzing urine for "specified drugs," while "[t]he use of samples to test for any other substances" was "prohibited"); *Skinner*, 489 U.S. at 616, 625-626 (relying on mandatory limits on blood testing).

The same analysis is appropriate here. The States and the federal government are not permitted to exam-

ine the "vast genetic treasure map" that could be derived from a buccal-swab DNA sample. The government's possession of the sample threatens privacy no more (and perhaps less) than its possession of the cells sloughed off onto a fingerprint card. See generally Nat'l Comm'n on the Future of DNA Evidence, U.S. Dep't of Justice, *What Every Law Enforcement Officer Should Know About DNA Evidence* 3 (1999). The presence of personal genetic information in a DNA sample is therefore irrelevant to whether an arrestee's privacy is invaded by analysis of that sample to obtain a DNA identification profile.

4. It is possible that future changes in the scientific or legal landscape might require a reassessment of the intrusion on an arrestee's privacy occasioned by DNA fingerprinting. If an arrestee's DNA is analyzed in some new way, or an existing analysis yields some new information, and that change in the status quo infringes the arrestee's reasonable expectation of privacy, then a new Fourth Amendment analysis might well be in order.[9] See generally *Skinner*, 489 U.S. at 616; *United States* v. *Edwards*, 415 U.S. 800, 803-804 (1974); see also, *e.g.*, *Mitchell*, 652 F.3d at 408-409.

This Court's precedents make clear, however, that only an *actual* intrusion on privacy—and not any additional intrusion that can possibly be imagined—weighs in the Fourth Amendment balance. See *Dow Chem. Co.* v. *United States*, 476 U.S. 227, 239 (1986) ("Fourth Amendment cases must be decided on the facts of each

---

[9] Merely running searches in a database does not infringe any expectation of privacy or trigger any fresh constitutional analysis. See *Boroian* v. *Mueller*, 616 F.3d 60, 68 (1st Cir. 2010); *Johnson* v. *Quander*, 440 F.3d 489, 498-499 (D.C. Cir.), cert. denied, 549 U.S. 945 (2006).

case, not by extravagant generalizations."); *United States* v. *Karo*, 468 U.S. 705, 712 (1984) (Court has never held that "potential, as opposed to actual, invasions of privacy constitute searches"). Accordingly, neither speculation that DNA identification profiles might someday yield up private information nor the remote chance that government use of DNA samples might someday expand is relevant to the outcome in this case. See *Garcia* v. *Texas*, 131 S. Ct. 2866, 2867 (2011) (per curiam) (Court's "task is to rule on what the law is, not what it might eventually be").

C. States And The Federal Government Have A Strong Interest In Obtaining DNA Identification Profiles From Arrestees

1. The government has a powerful interest in knowing the identity of individuals who have entered the criminal justice system. See, *e.g.*, *Hiibel* v. *Sixth Judicial Dist. Court*, 542 U.S. 177, 186 (2004); *INS* v. *Delgado*, 466 U.S. 210, 216 (1984). "In every criminal case," the Court has explained, "it is known and must be known who has been arrested and who is being tried." *Hiibel*, 542 U.S. at 191. Among other things, knowledge of identity permits the police to determine whether "a suspect is wanted for another offense, or has a record of violence or mental disorder," and "may help clear a suspect and allow the police to concentrate their efforts elsewhere." *Id.* at 186.

For those reasons, routine police procedure has long included photographing an arrestee, taking his fingerprints, and running those fingerprints through a database in a search of a match. See p. 16, *supra*. Those indisputably constitutional procedures give the police valuable information about the person in their custody. See *Kelly*, 55 F.2d at 68, 70 (stating that fingerprinting

is a "means for the identification of prisoners," including ascertaining whether they are "second offenders"); see also *Lafayette*, 462 U.S. at 643-649.

DNA identification of arrestees serves the same interests—but more powerfully, because of its unequalled accuracy. See *District Atty's Office for Third Judicial Dist.* v. *Osborne*, 557 U.S. 52, 55, 62 (2009). An arrestee may give a false name and change his appearance to avoid recognition. Fingerprint records may be unavailable, incomplete, or inconclusive. See 73 Fed. Reg. at 74,934, 74,942. A DNA fingerprint, however, is unique and unalterable. A comparison between an arrestee's DNA profile and the other DNA profiles stored in CODIS therefore may yield information about his identity that is not available through any other means. See *CODIS and NDIS Fact Sheet*, *supra*; *United States* v. *Sczubelek*, 402 F.3d 175, 184-186 (3d Cir. 2005), cert. denied, 548 U.S. 919 (2006).

Even if DNA fingerprinting only duplicated other available information, the government could still permissibly acquire it to confirm or ascertain identity. See *City of Ontario* v. *Quon*, 130 S. Ct. 2619, 2632 (2010) (stating that this Court has "repeatedly refus[ed] to declare that only the 'least intrusive' search practicable can be reasonable" (quoting *Vernonia*, 515 U.S. at 663)). But DNA fingerprinting has benefits in identifying arrestees that fingerprinting alone cannot realize, and thus performs a distinct and important function.

2. In addition, DNA fingerprinting promotes the government's powerful interest in supervising an arrestee who is facing charges. Authorities must decide whether such an arrestee can safely be released during the pretrial period, what restrictions are necessary if he is released, what precautions should be taken if he is

placed in pretrial detention, and how to ensure that he complies with the rules that govern him and ultimately appears for trial. Information derived from DNA identification profiles can play a vital role in making those decisions, which have serious implications for the public's safety and the integrity of the justice system. See 73 Fed. Reg. at 74,934; cf. *Samson*, 547 U.S. at 853 (noting state's " 'overwhelming interest' in supervising parolees").

Initially, "[w]hether an arrestee is possibly implicated in other crimes is critical to the determination of whether or not to order detention pending trial." *Mitchell*, 652 F.3d at 414; see 73 Fed. Reg. at 74,934. An arrestee's DNA may match the DNA found in crime-scene evidence from a murder, rape, or other serious offense. Such a match would suggest that the arrestee is a danger to the public; it also would suggest that he has an incentive to flee, lest his involvement in other crimes be discovered. That kind of information is highly relevant to whether an arrestee should remain in custody. See, *e.g.*, 18 U.S.C. 3142(g) (2006 & Supp. V 2011) (release decision by judicial officer must take into account "the history and characteristics of the person, including * * * past conduct, * * * criminal history, and * * * the nature and seriousness of the danger to any person or the community that would be posed by the person's release"); Md. Rule 4-216(f) (same); cf. *Griffin*, 483 U.S. at 879.[10]

---

[10] The information may be generated quickly enough to be used in an initial determination of whether to detain or release an arrestee. See, *e.g.*, Office of the Inspector Gen., U.S. Dep't of Justice, *Audit of the FBI's Convicted Offender, Arrestee, and Detainee DNA Backlog* 2-3 (Sept. 2011); see also Peter M. Vallone, *Rapid Forensic DNA Typing: Protocols and Instrumentation* (presentation at Nov. 28,

Regardless whether an arrestee is detained or released, database-match information can bear strongly on the mode by which the government supervises the arrestee and the effectiveness of that supervision. If an arrestee remains in custody, authorities can use that information to determine where to confine him and under what security measures. See *Florence*, 132 S. Ct. at 1518, 1520-1522 (noting the "undoubted security imperatives involved in jail supervision" and observing that "[p]eople detained for minor offenses can turn out to be the most devious and dangerous criminals"); *Bell*, 441 U.S. at 546 (stating that "institutional security and * * * internal order and discipline are essential goals" as to "pretrial detainees"); 73 Fed. Reg. at 74,934. If an arrestee is released pending trial, that information can influence the appropriate conditions of release. *Ibid.* An arrestee's knowledge that his DNA is on file may also deter him from violating release conditions or from engaging in other criminal activity. See *Salerno*, 481 U.S. at 749-750 ("The government's interest in preventing crime by arrestees is both legitimate and compelling.").

Finally, possession of DNA identification profiles can aid the government in apprehending detainees who have escaped or releasees who have absconded. If a person who has fled commits a crime and leaves DNA at the crime scene, his linkage to that crime through DNA fingerprint matching provides a lead as to his present location. See 73 Fed. Reg. at 74,934; cf. *United States* v.

2012 Forensics@NIST 2012 Meeting), http://www.nist.gov/oles/upload/ 10_Vallone-rapid-DNA-2.pdf (explaining new technology that can generate a DNA fingerprint rapidly). If not, it can be the basis for modification of status, including revocation of release. See, *e.g.*, Md. Rule 4-216.1(c); 18 U.S.C. 3145.

Kincade, 379 F.3d 813, 838 (9th Cir. 2004), cert. denied, 544 U.S. 924 (2005). The government has a strong interest in ensuring that defendants—whether detained or released—ultimately appear for trial. See *Bell*, 441 U.S. at 536.

3. DNA fingerprinting of arrestees also serves society's fundamental interest in accurately solving crimes where the criminal left his DNA at the crime scene and other evidence is insufficient to identify him. As this Court has recognized, "[m]odern DNA testing can provide powerful new evidence unlike anything known before. * * * It is now often possible to determine whether a biological tissue matches a suspect with near certainty." *Osborne*, 557 U.S. at 62. Thus, "DNA testing has an unparalleled ability * * * to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices." *Id.* at 55; see John Roman et al., Urban Inst., *The DNA Field Experiment: Cost-Effectiveness Analysis of the Use of DNA in The Investigation of High-Volume Crimes* 4, 147 (2008) (concluding based on randomized experiment that "DNA evidence led to a considerably higher number of suspect identifications and arrests than fingerprint evidence").

States and the federal government unquestionably have an "interest in apprehending violators" through DNA, *Knights*, 534 U.S. at 121, and in doing so as quickly as possible. Bringing the guilty to justice vindicates the law and protects the public—even where an arrestee would ultimately be incarcerated for some period of time as punishment for the crime that prompted the arrest. Identifying the true perpetrator of a crime also can exonerate the innocent, who may be suspected or even convicted and incarcerated despite the presence of an-

other person's DNA at the crime scene. See *Osborne*, 557 U.S. at 55; *Mitchell*, 652 F.3d at 415; H.R. Rep. 900, at 10. And solution of crimes brings closure to victims, who may live in fear that they will be victimized again so long as the criminals responsible for injuring them remain at large. See *Kincade*, 379 F.3d at 839; 73 Fed. Reg. at 74,933-74,934. Those benefits are at the very heart of government's basic responsibility to maintain order and shield its citizens from harm.

They are also far from hypothetical. The facts of this case provide an excellent illustration: the DNA profile that the State obtained from respondent at arrest identified him as the rapist in a crime that had gone unsolved for six years. See Pet. Br. 25. Jurisdictions around the country with laws requiring DNA samples from arrestees have made similar reports. Recently, for example, the DNA fingerprint of an arrestee facing a federal weapons charge matched DNA found under the fingernails of one of three young women who were shot and killed in 1990. See *DNA leads to suspect in 3 slayings in Spokane area 22 years ago*, Seattle Times (Nov. 20, 2012); see generally 151 Cong. Rec. S13,756-13,758 (daily ed. Dec. 16, 2005) (remarks of Sen. Kyl, sponsor of federal DNA legislation) (discussing "real life examples"); FBI, *CODIS-NDIS Statistics*, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/ndis-statistics (last visited Dec. 28, 2012) (taking into account arrestees and convicted offenders and stating that "[a]s of November 2012, CODIS has produced over 195,600 hits assisting in more than 187,700 investigations"). Arrestees as a class are highly likely to include recidivists, see, *e.g.*, Bureau of Justice Statistics, Federal Justice Statistics, 2009 (Dec. 2011), at 10 (Table 8) (nearly two-thirds of federal defendants had at least one prior con-

viction, and more than one-fifth had more than five), and society has a surpassing interest in promptly determining whether they are responsible for unsolved crimes—an interest that cannot be served as effectively by any means other than DNA fingerprinting.

4. The court below believed that governmental interests would be equally well served by DNA fingerprinting after conviction. See Pet. App. 67a. Later DNA collection, however, would deprive authorities of critical information for making decisions about pretrial detention and release—an area in which mistakes can result in new serious offenses. It would sacrifice the benefits of deterring crime by arrestees who are released before trial. And it would delay the solution of some crimes by months or years.[11] During that delay, scarce law enforcement resources would be squandered; victims would continue to suffer; and innocent people could be wrongly suspected, accused, or convicted of those crimes. See *Mitchell*, 652 F.3d at 414-415.

The relevant governmental interests, therefore, are not merely generalized interests in obtaining a DNA fingerprint early in the criminal process. They are concrete practical interests in obtaining that unique identifier from *arrestees* to serve pressing goals at that time.

D. The Government's Interests Outweigh The Arrestee's

Analyzing the totality of the circumstances, the scales tip decidedly in favor of the government's interests in obtaining DNA identification profiles from arrestees. The minimal intrusion into the privacy of someone who

---

[11] Those benefits would also be lost if DNA fingerprinting were permitted only when authorities could not learn the name of an arrestee through traditional fingerprinting or other means. See Pet. App. 4a.

has already been taken into custody—a light swab of the cheek and analysis limited to identification information—is outweighed by the powerful need to identify the individual who has been arrested, make decisions about his supervision and placement, and solve and deter crimes.[12]

In addition to the relative strength of those interests, this case shares other features with cases where this Court has found a warrantless search reasonable. A warrant requirement would entirely thwart the government's interests, while the restraints on official discretion in taking DNA are already substantial. DNA fingerprinting "is not the kind of event that involves suspicion, or lack of suspicion, of the relevant individual." *Lidster*, 540 U.S. at 424-425; see *Lafayette*, 462 U.S. at 643-644 (where "justification" for search "does not rest on probable cause, * * * the absence of a warrant is immaterial"). Rather, its value comes in routinely identifying an individual, and potentially shedding light on his past conduct, after probable cause has justified his arrest. Requiring a warrant would thus "jeopard[ize]"

---

[12] Because the totality of the circumstances dictates reversal, this Court need not analyze whether this case involves "special needs." But such needs—"beyond the normal need for law enforcement," *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 37 (2000)—do exist here. The law at issue is not targeted at investigating any *particular* crime, and a DNA fingerprint standing alone is not incriminating (unlike a blood sample containing illegal drugs). Moreover, the law's goals include exoneration of the innocent, supervision of arrestees in the period before trial, and improvement in future public safety—all of which are outside the government's "general interest in crime control." *Illinois* v. *Lidster*, 540 U.S. 419, 424 (2004); see *Griffin*, 483 U.S. at 875, 879 (deeming interest in ensuring that the "community is not harmed by the probationer's being at large" a special need).

the benefits of DNA fingerprinting. *Skinner*, 489 U.S. at 624. At the same time, the Maryland law (like analogous laws in other jurisdictions) serves many of the purposes of a warrant. See *Martinez-Fuerte*, 428 U.S. at 565-566. It applies to a defined group of people and includes numerous restrictions, thus ensuring that DNA fingerprinting is "not 'subject to the discretion of the official in the field.'" *Delaware* v. *Prouse*, 440 U.S. 648, 654-655 (1979) (quoting *Camara*, 387 U.S. at 532). Accordingly, "a warrant requirement here would make little contribution." *Martinez-Fuerte*, 428 U.S. at 565.

In those respects, DNA fingerprinting is virtually indistinguishable from traditional fingerprinting. Both are critical to the safety of the public, and both are reasonable exercises of government power in light of the reduced privacy interest of arrestees in their identities. See *Kelly*, 55 F.2d at 68 ("The slight interference with the person involved in finger printing seems to us one which must be borne in the common interest."). Thus, although DNA fingerprinting is a recent development, it is effectively backed by a long history. The court below was wrong to distinguish the two practices.

CONCLUSION

The judgment of the Court of Appeals of Maryland should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ELAINE J. GOLDENBERG
Assistant to the Solicitor General
ROBERT A. PARKER
CHRISTOPHER J. SMITH
Attorneys

JANUARY 2013

AMICUS CURIAE BRIEF

No. 12-207

IN THE

Supreme Court of the United States

STATE OF MARYLAND,

Petitioner,

v.

ALONZO JAY KING, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE MARYLAND COURT OF APPEALS

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, ACLU OF MARYLAND, AND ACLU OF NORTHERN CALIFORNIA SUPPORTING RESPONDENT

ERIC A. LONG
PETER C. MEIER
JAMIE L. WILLIAMS
Paul Hastings LLP
55 Second Street
Twenty-Fourth Floor
San Francisco, CA 94105
(415) 856-7000

[Additional Counsel Listed On Inside Cover]

MICHAEL T. RISHER
Counsel of Record
American Civil Liberties Union Foundation of Northern California
39 Drumm Street
San Francisco, CA 94111
(415) 621-2493
mrisher@aclunc.org

Counsel for Amici Curiae

STEVEN R. SHAPIRO
EZEKIEL R. EDWARDS
BRANDON J. BUSKEY
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10025
(212) 549-2500

DAVID R. ROCAH
American Civil Liberties
Union Foundation
of Maryland
3600 Clipper Mill Road
Suite 350
Baltimore, MD 21211
(410) 889-8555

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. DNA IS NOT A TOOL FOR IDENTIFYING ARRESTEES 5

II. THE STATE CANNOT MEET ITS BURDEN UNDER A TOTALITY-OF-THE-CIRCUMSTANCES TEST 10

A. Compulsory DNA testing implicates significant privacy interests 11

1. DNA sampling involves a significant physical intrusion into the body 11

2. Nonconsensual DNA sampling implicates serious genetic privacy interests 12

3. The use of familial searching illustrates how DNA testing can invade privacy 15

4. The Government's indefinite retention of the physical DNA samples poses a distinct danger to genetic privacy 18

5. The State's rationale for testing would allow it to take DNA from people who have not even been arrested 18

B. Taking and databanking DNA from persons not convicted of a crime does not improve CODIS's effectiveness at solving crime..... 21

1. Studies from the U.K. and RAND show that arrestee testing fails to significantly improve database hit rates 21

2. Petitioner's and its *amici*'s anecdotal evidence of efficacy to not support arrestee DNA collection 26

III. BECAUSE MANY JURISDICTIONS HAVE DNA COLLECTION LAWS EVEN BROADER THAN MARYLAND'S, THEY PRESENT ADDITIONAL CONSTITUTIONAL QUESTIONS BEYOND THOSE RAISED IN THIS CASE 31

A. Many jurisdictions take DNA at arrest for minor crimes..... 32

B. Many jurisdictions take DNA from persons never charged with a crime..... 34

C. Many jurisdictions analyze DNA samples without any judicial finding of probable cause..... 35

D. Expunging DNA samples in many jurisdictions is difficult 37

CONCLUSION 39

TABLE OF AUTHORITIES

Page(s)

CASES

Arizona v. *Gant*,
556 U.S. 332 (2009) 30, 31

County of Riverside v. *McLaughlin*,
500 U.S. 44 (1991) 36

Gerstein v. *Pugh*,
420 U.S. 103 (1975) 35, 37

Haskell v. *Brown*,
677 F. Supp. 2d 1187 (N.D. Cal. 2010) ... *passim*

Haskell v. *Harris*,
669 F.3d 1049 (9th Cir. 2012) vacated as moot, r'hrg *en banc* pending, 686 F.3d 1121 (2012) ..... *passim*

Hiibel v. *Sixth Judicial District Court of Nevada, Humboldt County*,
542 U.S. 177 (2004) 19

House v. *Bell*,
547 U.S. 518 28

Kyllo v. *United States*,
533 U.S. 27 (2001) 12, 13

Mincey v. *Arizona*,
437 U.S. 385 (1978) 11

Norman-Bloodsaw v. *Lawrence Berkeley Lab.*,
135 F.3d 1260 (9th Cir. 1998) 12

People v. *Buza*,
129 Cal. Rptr. 3d 753 (Cal. App.), rev.
granted, 262 P.3d 854 (Cal. 2011) ..... *passim*

People v. *Statum*,
28 Cal. 4th 682 (2002) 32

Schmerber v. *California*,
384 U.S. 757 (1966) 12

United States v. *Jeffers*,
342 U.S. 48 (1951) 11

United States v. *Kincade*,
379 F.3d 813 (9th Cir. 2004) 13, 21

Zurcher v. *Stanford Daily*,
436 U.S. 547 (1978) 35

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS, AND RULES

Amend. IV., U.S. Constitution ..... *passim*

5 U.S.C. § 552a 9

16 U.S.C. § 551 33

18 U.S.C. § 3600(a)(9) 28

38 U.S.C. § 901 33

42 U.S.C. § 14132(d) 18

42 U.S.C. § 14135a(a)(1)(A) 33, 34

28 C.F.R. § 28.12(b) 33, 34

28 C.F.R. § 28.12(e)(2) 8

28 C.F.R. § 28.12(f)(2) 33

36 C.F.R. § 261.1b 33

36 C.F.R. § 261.16(c) 33

36 C.F.R. § 261.16(j) 33

36 C.F.R. § 261.58(bb) 33

38 C.F.R. § 1.218(a)(9) 33

38 C.F.R. § 1.218(a)(12) 33

73 Fed. Reg. 74932 ..... 8, 33

Cal. Health & Safety Code § 11350 32

Cal. Health & Safety Code § 11377 32

Cal. Penal Code §17(a) 32

Cal. Penal Code §18 32

Cal. Penal Code § 296(a)(2)(C) 32

Cal. Penal Code § 296.1(a)(1)(A) 34

Cal. Penal Code § 299(b) 37

Cal. Penal Code § 299(b)(1) 38

Cal. Penal Code § 299(b)(3) 38

Cal. Penal Code § 299(c) 37

Cal. Penal Code § 299(d) 38

Cal. Penal Code § 299.5(i)(2)(b) 38

Cal. Penal Code § 487(b) 32

Cal. Penal Code § 489 32

Cal. Penal Code § 570 32

Genetic Information Nondiscrimination Act of 2008, PL 110-233, 122 Stat 881 § 2 13

Md. Code, Pub. Safety § 2-505(b)(2) 9

Md. Code Regs. § 29.05.01.01(B)(1) 8

Md. Code Regs. § 29.05.01.04B(4) 8

Md. Code Regs. § 29.05.01.04(K) 6

Md. Code Regs. § 29.05.01.04(L) 6, 8

Md. Code Regs. § 29.05.01.07(C) 8

Md. Code Regs. § 29.05.01.12 ..... 7, 28

Md. Rules, Rule 4-201(c) 8

Md. Rules, Rule 4-202(b) 35

Md. Rules, Rule 4-211(b)(2) 35

Md. Rules, Rule 4-213 8

OTHER AUTHORITIES

Appellees' Response to Appellants' Request for Judicial Notice in Haskell II (Sept. 10, 2012), available on the Ninth Circuit's website at http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000584 25

Arrestee DNA Leads to Arrest of Suspect in Sierra LaMar Abduction, available at http://oag.ca.gov/sites/all/files/pdfs/bfs/garcia_torres_sierra_lamar_abduction. pdf 30

Cal. Dep't of Justice, Division of Law Enforcement Information Bulletin 2008-BFS-01, *DNA Partial Match (Crime Scene DNA Profile to Offender) Policy* (April 24, 2008), available at http://ag.ca.gov/cms_attachments/press/pdfs/n1548_08-bfs-01.pdf. 16, 17

Cal. Dep't of Justice, Division of Law Enforcement Information Bulletin 2008-BFS-02, *Expansion of State's DNA Data Bank Program on January 1, 2009: Collection of DNA Samples From All Adults Arrested for Any Felony Offense*, available at http://oag.ca.gov/sites/all/files/pdfs/bfs/69IB_121508.pdf?. 32

Cal. Dep't of Justice, Jan Bashinski, DNA Laboratory Monthly Statistics, November 2012 updated monthly, available at http://oag.ca.gov/sites/all/files/pdfs/bfs/Monthly.pdf? 25

Cal. Dep't of Justice, *Crime in California 2011* (Table 38A, Dispositions of Adult Felony Arrests 2006-2011), available at http://oag.ca.gov/sites/all/files/pdfs/cjsc/publications/candd/cd11/cd11.pdf 34, 38

Carolyn Puckett, The Story of the Social Security Number, Social Security Bulletin, Vol. 69 No. 2 (2009), available at http://www.ssa.gov/policy/docs/ssb/v69n2/v69n2p55.html 20

Christina Buschmann, *Mandatory Fingerprinting of Public School Teachers: Facilitating Background Checks or Infringing on Individuals' Constitutional Rights?*, 11 Wm. & Mary Bill Rts. J. 1273 (2003) 20

David J. Kaufman et al., *Public Opinion about the Importance of Privacy in Biobank Research*, 85 Am. J. Human Genetics (Nov. 13, 2009), available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2775831 14

E.W. Clayton, *Ethical, legal, and social implications of genomic medicine,* N. Engl. J. Med. 349 (2003) 14

FBI, *CODIS Expungement Policy*, available at http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis_expungement 18

FBI, *Criminal Background Check*, available at http://www.fbi.gov/about-us/cjis/background-checks 7

FBI, *Familial Searching*, available at http://www.fbi.gov/about-us/lab/biometric-analysis/codis/familial-searching. 16

FBI, *Five Key Services*, available at http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis_services 7

FBI, *Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System*, available at http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet. ... 9, 28

FBI, *IAFIS Fact Sheet*, available at http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis_facts. 6, 7

FBI, Whatman EasiCollect™: Collection of Buccal Samples, available at http://www2.fbi.gov/hq/lab/images/easicollect_hires.jpg 12

Gina Kolata, *Seeking Answers in Genome of Gunman*, The New York Times (Dec. 25, 2012), available at http://www.nytimes.com/2012/12/25/science/scientists-to-seek-clues-to-violence-in-genome-of-gunman-in-newtown-conn.html ... 15

Great Britain Home Office, Forensic Science and Pathology Unit, *DNA Expansion Programme 2000-2005: Reporting Achievement* (2005), available at http://www.statewatch.org/news/2006/jan/uk-DNA-database.pdf ... 22

Haskell v. *Brown*, No. 3:09-cv-04779-CRB (N.D. Cal.), Dkt. 17, Declaration of Bruce Bedowle ... 26

Haskell v. *Brown*, No. 3:09-cv-04779-CRB (N.D. Cal.), Dkt. 19, Declaration of Helen Wallace ... 23

Haskell v. *Brown*, No. 3:09-cv-04779-CRB (N.D. Cal.), Dkt. 34, Declaration of Jayann Sepich ... 29

Helen Wallace, *The UK National DNA Database: Balancing Crime Detection, Human Rights and Privacy, European Molecular Biology Organization Report* (July 2006), available at http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1490298. ... 23

Henry T. Greely, Daniel P. Riordan, Nanibaa' A. Garrison, Joanna L. Mountain, *Family Ties: The Use of DNA Offender Databases to Catch Offenders' Kin*, Journal of Law, Medicine & Ethics, 34:248-262 (Summer 2006). 16

Innocence Project, *Facts on Post-Conviction DNA Exonerations*, available at http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php. 29

Innocence Project, *Know the Cases: David Allen Jones*, available at http://www.innocenceproject.org/Content/David_Allen_Jones.php 27

Kaaryn Gustafson, *The Criminalization Of Poverty*, 99 J. Crim. L. & Criminology 643 (2009) 20

KFOX14, *Police Get Break In Katie Sepich Murder Case*, available at http://www.kfoxtv.com/news/news/police-get-break-in-katie-sepich-murder-case/nKLbt/ 29

Michael R. Bromwich, *Final Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room* (June 13, 2007), available at http://www.hpdlabinvestigation.org/reports/070613report.pdf 15

Michael T. Risher, Racial Disparities in Databanking of DNA Profiles, in Sheldon Krimsky and Kathleen Sloan, eds., *Race and the Genetic Revolution* (Columbia Univ. Press 2011) 20

Natalie Ram, *Fortuity and Forensic Familial Identification*, 63 Stan L. Rev. 751 (Apr. 2011) 15, 16

Peter Komarinsk, *Automated Fingerprint Identification Systems (AFIS)* (Elsevier 2005) 6

Privacy Impact Assessment, National DNA Index System (DNS) (2004), available at http://www.fbi.gov/foia/privacy-impact-assessments/dns 9

Sheldon Krimsky and Tania Simoncelli, *DNA Databanks, Criminal Investigations, and Civil, Liberties* (Columbia Univ. Press 2011) 16

State DNA Database Laws, Qualifying Offenses, available at http://www.dnaresource.com/documents/statequalifyingoffenses2011.pdf 32

Tom McGhee, *Chase Suspect was in Denver Jail 6 Months*, Denver Post, Jan. 30, 2008, available at http://www.denverpost.com/perspective/ci_8118708?source=pkg 30

U.S. Dep't of Justice, Office of Justice Programs, National Institute of Justice, *The Fingerprint Sourcebook*, Chapter 6, available at http://www.nij.gov/pubs-sum/225320.htm §§ 6.2.4, 6.4.2 (2011).....6

U.S. Public Opinion on Uses of Genetic Information and Genetic Discrimination, available at http://www.dnapolicy.org/resources/GINAPublic_Opinion_Genetic_Information_Discrimination.pdf.....14

INTERESTS OF *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members, dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The American Civil Liberties Union of Maryland and the American Civil Liberties Union of Northern California are two of the ACLU's affiliates. Like the national ACLU, they have been active participants in the debate over the expansion of DNA databanks. The ACLU of Maryland participated as *amicus* in this case before the Maryland Court of Appeals, and was instrumental in leading the legislative effort to oppose the bill at issue.

The ACLU of Northern California is currently litigating the constitutionality of California's arrestee-testing law, a statute that is even broader than the Maryland statute here at issue and has helped make California's database the third-largest DNA database in the world, after the United States' combined database and the United Kingdom's. That case, *Haskell* v. *Harris*, contains an extensive factual record about arrestee testing, statistics bearing on its efficacy, and the privacy issues it raises. *See Haskell* v. *Brown*, 677 F. Supp. 2d 1187 (N.D. Cal. 2010) ("*Haskell I*"). It is currently before an *en banc*

---

[1] The parties have submitted blanket letters of consent to the filing of *amicus* briefs in this case. No counsel for a party has written this brief in whole or in part, and no one other than *amici*, their members or their counsel has made a monetary contribution for the preparation or submission of this brief.

panel of the Ninth Circuit on Plaintiffs' appeal of the district court's denial of preliminary injunctive relief. *See Haskell* v. *Harris*, 669 F.3d 1049 (9th Cir. 2012), vacated as moot, r'hrg *en banc* pending, 686 F.3d 1121 (2012) ("*Haskell II*"). After hearing argument, the Ninth Circuit stayed proceedings pending this Court's decision here.

SUMMARY OF ARGUMENT

Amici fully endorse Respondent's argument that the compulsory extraction and analysis of a person's DNA is a search, and that the searches here at issue do not fall within any exception to the warrant requirement. Rather than repeating that discussion, this brief focuses on four discrete points.

First, contrary to the government's argument, DNA is not used to identify arrestees. *See People* v. *Buza*, 129 Cal. Rptr. 3d 753, 773 (Cal. App.), rev. granted, 262 P.3d 854 (Cal. 2011) ("DNA is not used to verify who a person is" at arrest.).[2] The federal Combined Online DNA Index System (CODIS) does not allow for the routine comparison of arrestee samples with other known samples, which would be a necessary part of using the database to identify arrestees. Instead, DNA collected from arrestees is compared only with crime-scene samples. DNA

---

[2] The California Court of Appeal's opinion in *Buza* contains a more thorough and accurate discussion of the factual and legal issues surrounding arrestee DNA testing than any other judicial opinion. The California Supreme Court has deferred further action in *Buza* while this Court considers the present case.

collection is therefore used solely to investigate unsolved crimes.

Second, arrestee testing implicates serious privacy concerns. It involves a bodily intrusion for an individual's genetic blueprint, and the information it reveals is increasingly used for familial searching, thus extending its reach far beyond the actual person arrested. In addition, the arguments advanced in support of arrestee testing have no obvious limiting principle. If DNA testing is (improperly) justified as a form of identification, like fingerprinting, then it is easy to imagine the day when the government will argue that DNA testing is appropriate in other situations where the government seeks to establish someone's identity. Indeed, that has been the history of fingerprinting, which began as a criminal justice tool and has now migrated to other uses.

Third, even if the government's general interest in solving crimes were adequate cause for an exception to the warrant requirement, taking DNA from people who are innocent before the law does not substantially serve this purpose. Although neither the federal government nor the states have been willing to release the data that would be needed to conduct a definitive analysis of databank efficacy, research from the RAND Corporation and the United Kingdom shows it is primarily the size of the *crime-scene* database that controls the efficacy of DNA databanks, so long as the known-offender database is populated with a sufficient number of persons who are actually involved in criminal activity. Thus, taking DNA from mere arrestees –

approximately 1/3 of whom (in California at least) will never be convicted of any criminal offense and 19% of whom will not even be charged with a crime – fails to contribute substantially to the states' efforts to solve more crimes. As the RAND researchers concluded, "focusing on uploading proven offenders and crime-scene profiles has a greater impact on database matches ("investigations aided") than uploading suspected offenders at the point of arrest." Jeremiah Goulka, Carl F. Matthies, Emma Disley, and Paul Steinberg, *Toward a Comparison of DNA Profiling and Databases in the United States and England* (RAND 2010) at 18, available at http://www.rand.org/content/dam/rand/pubs/technical_reports/TR918.pdf.

Furthermore, many of the same cases that the State and its *amici* present here as purported proof of the value of arrestee testing were carefully considered by the *Haskell* court, which concluded "that mandatory testing at these offenders' first convictions would have generated the same result." *Haskell I*, 677 F. Supp. 2d at 1201 (internal quotation marks omitted).

Fourth, many DNA laws are even broader than Maryland's. California, for example, seizes and searches the DNA of everyone arrested for *any* felony, including crimes such as stealing $250 worth of fruits or nuts from a farmer's field, unlawfully subleasing a car, or simple drug possession. The federal government takes DNA from persons arrested even for minor misdemeanors, which can include people arrested for walking a dog off-leash or distributing leaflets without permission. Like many

states, both of these jurisdictions analyze and upload into CODIS the DNA samples of every eligible arrestee, including those never charged with a crime, without any judicial involvement. And most states and the federal government lack any provision for automatic expungement for persons who are not convicted. Although Maryland's law is narrower than these other states', Petitioner's arguments, and those of its *amici*, are crafted to try to justify these much broader laws, with no limiting principle. In fact, if these arguments were correct then the government's authority to collect DNA would extend far beyond arrestees. Rather than accepting these overbroad arguments, this Court should restrict the government's authority to engage in suspicionless, warrantless collection of DNA to those who have crossed our criminal-justice systems' most fundamental line: conviction. Seizing and searching the genetic blueprint of Americans who have not been convicted of a crime should continue to require a warrant supported by probable cause.

ARGUMENT

I. DNA IS NOT A TOOL FOR IDENTIFYING ARRESTEES

Although the State and many of its *amici* frame their use of DNA as a means of "identification," this position rests on "an uncommonly capacious definition of 'identification.'" *Buza*, 129 Cal. Rptr. 3d at 771. In reality, the *only* reason the government is seizing DNA samples from arrestees is to connect them to unsolved crimes. Indeed, the structure of CODIS and the way that the

government takes and processes arrestee DNA samples renders the government incapable of using these samples to "verify who a person is," in the sense of determining his name, criminal record, or outstanding warrants.[3] *Id.* at 773. Several aspects of the program demonstrate this:

As an initial matter, like California and other states, Maryland expressly requires that the police identify an arrestee using an electronic fingerprint at the time they seize his DNA and then relies on this fingerprint identification to track the DNA sample. *See* Md. Code Regs. § 29.05.01.04(K); *accord Buza*, 129 Cal. Rptr. 3d at 773 ("[t]he individual collecting a sample shall verify the identity of the individual from whom a sample is taken[.]"). 99.6% of these identifying fingerprints are sent electronically to the FBI to process through its Integrated Automated Fingerprint Identification System (IAFIS).[4] Within minutes, the FBI responds

---

[3] A careful reading of the briefs submitted by the State and its *amici* confirm this: despite their continual references to "identification," no one contends that the police are actually using arrestee DNA to determine whom they have arrested, or explains how the police could do this.

[4] *See* http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis_facts; *see also* Md. Code Regs. § 29.05.01.04(L). "AFIS systems are the primary identification tool for virtually every law enforcement agency in the United States." Peter Komarinsk, *Automated Fingerprint Identification Systems (AFIS)*, at 4 (Elsevier 2005); *see id.* at 112-14 (discussing tenprint identification procedures). For a detailed discussion of AFIS, *see id.* and U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, *The Fingerprint Sourcebook*, Chapter 6, at http://www.nij.gov/pubs-sum/225320.htm §§ 6.2.4, 6.4.2 (2011).

with the identity of the arrestee or a report that the person's fingerprints are not on file (which also means that no DNA sample would be on file).[5] This system provides "results that are better than 99% accurate";[6] with proper procedures, "the accuracy rate can exceed 99.97%."[7] Thus, arrestees are nearly always identified through fingerprints at the time they are providing a DNA sample, long before that

---

[5] The FBI reports that it processed 58 million tenprint submissions in 2012, 55% of which were criminal inquiries. *See FBI, IAFIS Fact Sheet*, available at http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis_facts. Its average response time to those requests for a person's criminal history was less than five minutes. *See id.* (data for November 2012 "Criminal Electronic (CAR) Fingerprint Submissions"); *cf. Buza*, 129 Cal. Rptr. 3d at 773 & n.18.

[6] *The Fingerprint Sourcebook*, *supra* n.4, § 6.2.1.1. If there were a problem with this fingerprint identification, DNA could not cure it, because the FBI's entire criminal-records system relies on the accuracy of fingerprint identification; each record in that system is created and updated though the submission of arrestee fingerprints. *See* http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis_services ¶¶ 1, 3; *see also* http://www.fbi.gov/about-us/cjis/background-checks ("An FBI Identification Record—often referred to as a criminal history record or a "rap sheet"—is a listing of certain information taken from fingerprint submissions retained by the FBI in connection with arrests....").

[7] *Automated Fingerprint Identification Systems* (AFIS), *supra* n.4, at 122. This type of comparison involving two full sets of scanned fingerprints should be contrasted with those involving latent prints taken from crimes scenes, which are often incomplete and may result in errors. *See id.* at 114. It is important to note, too, that DNA databank comparisons are far from error-free, which is why the initial database match is used only to show probable cause, not as evidence of guilt. *See* Md. Code Regs. § 29.05.01.12.

sample could possibly be used to identify them.[8] In fact, jurisdictions including Maryland, California, and the federal government specifically waive collection of DNA from arrestees whom the government has identified as having already provided a sample. *See Buza*, 129 Cal. Rptr. 3d at 773; 73 Fed. Reg. 74932, 74941 ("to the extent that individuals entering the system through arrest or detention previously have had DNA samples collected . . repetitive collection is not required."); 28 C.F.R. § 28.12(e)(2); Md. Code Regs. § 29.05.01.04B(4). These provisions would make little sense if the police did not identify arrestees before seizing their DNA.

Maryland's requirement that the government not analyze an arrestee's DNA sample until after arraignment confirms that it does not use DNA to identify arrestees. "Arraignment" refers to a defendant's first appearance in the circuit court. Md. Code Regs. § 29.05.01.01(B)(1). It occurs only after a defendant has had (or waived) a preliminary hearing in the district court, or when an arrest warrant or indictment has issued. *See* Md. Rules, Rule 4-201(c), 4-213. Thus, although Mr. King's DNA was seized on April 10, 2009, it was not sent

---

[8] In those rare cases where the police are not able to use fingerprints to identify the arrestee at the time they seize his DNA (because the person's fingerprints are not on file), the sample itself is labeled with the arrestee's fingerprints, and "[t]hese prints shall be used by the laboratory to check the individual's identity." Md. Code Regs. § 29.05.01.04(L). The fingerprints are then used to track the stored sample. *See id.* § 29.05.01.07(C).

for analysis until June 25, 2009. *See* J.A. at 71. By that time, the government had long since identified Mr. King by his fingerprints.

Finally, there is no mechanism for using DNA to identify an arrestee. Arrestees' (or convicted persons') DNA CODIS profiles are never compared with other known profiles; they are compared only against crime-scene samples. The only "hits" that CODIS generates are between an offender profile and a crime-scene profile, or between two crime-scene profiles.[9] If the police were, in a specific case, to manually compare an arrestee's DNA profile against the known-person database and get a hit, the only information they would obtain is the CODIS ID number and the name of the laboratory that analyzed it. They would have to contact that lab to obtain the name of the person to whom that profile belonged. *See Buza*, 129 Cal. Rptr. 3d at 773.[10] This

---

[9] *See* http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet.

[10] Using the database to identify arrestees seems to be prohibited: the FBI's Privacy Impact Assessment for CODIS, issued pursuant to 5 U.S.C. § 552a, lists the intended uses of the CODIS system and specifically states that the FBI is collecting DNA profiles only for the purposes of seeking matches between the offender index and the crime-scene index, or within the forensic index, not matches within the known-person index. Privacy Impact Assessment, National DNA Index System (DNS) (2004), ¶¶ A-C, available at http://www.fbi.gov/foia/privacy-impact-assessments/dns.
Similarly, Maryland lists the permissible purposes for collecting and testing samples and specifically forbids "use for any purposes other than those specified," but the only identification purposes allowed involve missing persons or human remains. *See* Md. Code, Pub. Safety § 2-505(b)(2).

would entail another delay of at least three weeks while the lab confirms the match. *See* RAND 2010 at 10.

In sum, the State's own "protocol for DNA collection and analysis confirms that DNA is not used to verify who a person is." *See Buza*, 129 Cal. Rptr. 3d at 773. The *only* reason the State is collecting arrestees' DNA is to try to connect them with past or future unsolved crimes when it lacks probable cause for a warrant. As such, the State's assertion that arrestees lack the right to remain anonymous is irrelevant. The State is not seeking to overcome anyone's claim of anonymity; it is seeking evidence of unsolved crimes.

II. THE STATE CANNOT MEET ITS BURDEN UNDER A TOTALITY-OF-THE-CIRCUMSTANCES TEST

As discussed in Respondent's brief, settled Fourth Amendment doctrine prohibits the warrantless, suspicionless collection of DNA from persons merely arrested on suspicion of a crime. However, even under a totality-of-the-circumstances test, the compulsory search and seizure of DNA from arrestees is unconstitutional because the individual's privacy interests significantly outweigh the marginal benefits in solving crime from taking DNA from arrestees.

The government bears the burden to justify a warrantless search: here to show either that seizing DNA from persons who have never been convicted of a crime fits within an established exception to the

warrant requirement, *United* States v. *Jeffers*, 342 U.S. 48, 51 (1951), or to establish that this is an "exceptional situation" that merits a new exception to that requirement, *Mincey* v. *Arizona*, 437 U.S. 385, 390-91 (1978). Holding the government to this burden is particularly appropriate in a case such as this one where the government alone has access to the data that are needed to fully evaluate the efficacy of taking DNA at arrest, rather than from only those persons who are actually convicted of a crime.[11] Neither Petitioner nor any of its *amici* have met that burden.

A. Compulsory DNA testing implicates significant privacy interests

1. DNA sampling involves a significant physical intrusion into the body

On a purely physical level, the compulsory extraction of DNA by means of a blood draw or a buccal swab is more invasive than, for example, a search of a person's clothing or possessions, and the government's burden of justifying it is therefore

---

[11] As the RAND researchers lamented,

> Most of our data requests were denied, and several organizations that promised data did not provide any or all of what was promised. It appears that many of the key elements of data that would be essential for policy analysis in the field of forensic DNA analysis do not exist, while other elements are not easily accessible.

RAND 2010 at 3.

commensurately higher. The federal protocol for collecting DNA using a buccal swab calls for the officer to first insert the swab into the subject's mouth, use it to "soak up as much saliva as possible by running the applicator along gum-line, at fold line in cheek, and under tongue," "[t]hen, swab inside of cheeks for 15 seconds, and then swab the cheek for 15 seconds, and then to repeat the entire procedure." FBI, Whatman EasiCollect™: Collection of Buccal Samples, available at http://www2.fbi.gov /hq/lab/images/easicollect_hires.jpg. As this Court has explained, "search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned." *Schmerber* v. *California*, 384 U.S. 757, 770 (1966).

2. Nonconsensual DNA sampling implicates serious genetic privacy interests

More importantly, taking biological samples for the purpose of DNA analysis raises additional issues relating to privacy. "One can think of few subject areas more personal and more likely to implicate privacy interests than that of one's health or genetic make-up." *Norman-Bloodsaw* v. *Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998). DNA is our genetic blueprint, and with every passing year science learns how to unlock its secrets to discover more and more about us.[12] Beyond the

[12] The Court's Fourth Amendment analysis "must take account of more sophisticated systems that are already in use or in development." *Kyllo* v. *United States*, 533 U.S. 27, 36 (2001).

fact of bodily intrusion, the scientific examination, combined with the indefinite retention of the actual DNA samples for later re-analysis, implicates fundamental privacy interests protected by the Fourth Amendment. *See United States* v. *Kincade*, 379 F.3d 813, 873 (9th Cir. 2004) (Kozinski, J., dissenting) ("[I]t is important to recognize that the Fourth Amendment intrusion here is not primarily the taking of the blood, but the seizure of the DNA fingerprint and its inclusion in a searchable database."). With our genetic makeup, as with our homes, "all details are intimate details, because the entire area is held safe from prying government eyes." *Kyllo* v. *United States*, 533 U.S. 27, 37 (2001).

These privacy concerns are magnified where collection is mandatory and done in a law enforcement context, rather than a therapeutic, voluntary, medical one. As Congress recognized when it passed the Genetic Information Nondiscrimination Act of 2008, Americans want to have their genetic information used for medical purposes, but at the same time we worry that this same information could be misused by governmental or private entities.[13] Research by the Johns Hopkins University Genetics and Public Policy Center found that although 86% of Americans surveyed would trust their doctors with their genetic test results, more than half (54%) stated that they had little or no trust in law enforcement having access to this

---

[13] Genetic Information Nondiscrimination Act of 2008, PL 110-233, 122 Stat 881 § 2 (findings) (2008).

information.[14] A more recent survey conducted by the Center in 2008 found that 84% of Americans indicated that it would be important to have laws protecting genetic research information from law enforcement access.[15] Our society plainly recognizes the paramount importance of protecting our genetic privacy from infringement by law-enforcement officials.

That the government claims it will use DNA collected under this program only for law-enforcement identification purposes does not eliminate these concerns. The Fourth Amendment does not allow the government to seize and warehouse our personal papers just because it promises not to examine them, and the rule should be no different with our genetic blueprint. The same pressures that lead to violations of the Fourth Amendment and other statutory or legal privacy protections in more traditional investigations exist in our nation's crime labs, whether run by government or private contractors. For example, an investigation of the Houston, Texas crime lab found multiple instances of misconduct, including cases

---

[14] U.S. Public Opinion on Uses of Genetic Information and Genetic Discrimination, at 2, available at http://www.dnapolicy.org/resources/GINAPublic_Opinion_Genetic_Information_Discrimination.pdf; *see generally* E.W. Clayton, *Ethical, legal, and social implications of genomic medicine,* N. Engl. J. Med. 349 (2003).

[15] David J. Kaufman et al., *Public Opinion about the Importance of Privacy in Biobank Research,* 85 Am. J. Human Genetics (Nov. 13, 2009), available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2775831.

where analysts "reported conclusions, frequently accompanied by inaccurate and misleading statistics, that often suggested a strength of association between a suspect and the evidence that simply was not supported by the analyst's actual DNA results" and other instances where lab personnel simply fabricated test results.[16] Researchers who have long sought support for their claims that certain genetic traits or mutations lead to criminal behavior may well see DNA databanks as both a source of research samples and as a way to implement their theories, designating certain arrestees as more likely to offend based on their genetic profiles.[17]

3. The use of familial searching illustrates how DNA testing can invade privacy

Both the federal government and many states already allow CODIS to be used for so-called familial searching.[18] In familial searching, law enforcement

---

[16] Michael R. Bromwich, Final Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room, at 5 (June 13, 2007), available at http://www.hpdlabinvestigation.org/reports/070613report.pdf.

[17] *See* Gina Kolata, *Seeking Answers in Genome of Gunman*, The New York Times (Dec. 25, 2012) at D5, available at http://www.nytimes.com/2012/12/25/science/scientists-to-seek-clues-to-violence-in-genome-of-gunman-in-newtown-conn.html.

[18] As of 2010, 19 states had approved or reported the use of a partial match in an effort to associate a crime-scene profile with the family member of a person whose profile is in CODIS, although 15 of these states prohibit the police from deliberately using CODIS to engage in familial searching. *See* Natalie Ram,

uses the DNA database to focus on a person whose DNA does not match the crime-scene evidence – and who is therefore demonstrably innocent of the crime – because that profile is *similar* to DNA taken from a crime scene, based on the hope that the culprit may be related by blood to the known person who provided the similar sample.[19] The California protocol for familial searching in the CODIS database allows the government to create an "initial candidate list" comprising up to 168 individuals whose DNA profiles are similar to the one obtained from the crime-scene sample.[20] These samples are then subject to further investigation and analysis. "As part of this process the initial candidate list of offenders' DNA samples will be profiled for Y-STR

Fortuity and Forensic Familial Identification, 63 Stan L. Rev. 751, 767-71 (Apr. 2011). The federal government allows states to engage in familial searching but does not itself use the technique in the national database. *See* Sheldon Krimsky and Tania Simoncelli, *DNA Databanks, Criminal Investigations, and Civil, Liberties*, at 76-81 (Columbia Univ. Press 2011); *FBI, Familial Searching*, available at http://www.fbi.gov/about-us/lab/biometric-analysis/codis/familial-searching.

[19] *See* Henry T. Greely, Daniel P. Riordan, Nanibaa' A. Garrison, Joanna L. Mountain, *Family Ties: The Use of DNA Offender Databases to Catch Offenders' Kin*, Journal of Law, Medicine & Ethics, 34:248-262 (Summer 2006).

[20] Cal. Department of Justice, Division of Law Enforcement Information Bulletin 2008-BFS-01, *DNA Partial Match (Crime Scene DNA Profile to Offender) Policy* (April 24, 2008), available at http://ag.ca.gov/cms_attachments/press/pdfs/n1548_08-bfs-01.pdf.

type, meaning that they will be retested to check for a specifically paternal relationship."[21]

This means that a person whose DNA is included in the databank may find himself subject to having his sample further analyzed at any time in the future simply because it, along with 167 other samples, is similar to one found at a crime scene. And, if this further analysis fails to exclude him as a potential family member of the person who left the sample at the crime scene, he – and his family – may be subject to other forms of investigation as well, investigation that could reveal previously unknown family relationships and disrupt the lives of completely innocent individuals and families.[22] Thus, the government is already using DNA databanks in ways that are vastly more intrusive of personal and familial privacy than fingerprinting or many types of more conventional searches could ever be.

---

[21] *Id.* at 27.

[22] *Id.* ("Any offenders [with DNA profiles in CODIS] not eliminated by the Y-STR type comparison could be patrilineally related to the true perpetrator and will be candidates for further investigation and consideration as potential genetic relatives of the true perpetrator."). For a discussion of the effects that familial searching and the subsequent follow-up investigation may have, see Krimsky and Simoncelli, *supra* n.18 at 83-88.

4. The Government's indefinite retention of the physical DNA samples poses a distinct danger to genetic privacy

As California's familial searching protocol shows, the reason many jurisdictions maintain the biological samples indefinitely is to allow them to conduct future analyses whenever they choose to do so. Only nine of the states that collect DNA from arrestees automatically expunge samples from individuals who are not eventually convicted.[23] The other states and the federal government retain these samples even when the subject has never been convicted, or even charged, of any crime, unless he completes what may be "a lengthy and burdensome expungement process that is far from guaranteed to succeed." *Buza*, 129 Cal. Rptr. 3d at 782-83; *see* 42 U.S.C. § 14132(d); http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis_expungement. As discussed below, this means that nearly 100,000 people every year in California alone will likely have their DNA seized and permanently databanked, even though they are never convicted of anything.

5. The State's rationale for testing would allow it to take DNA from people who have not even been arrested

---

[23] *See* RAND 2010 at 6. Maryland's automatic-expungement provision that it emphasizes in support of its law is thus unusual.

If Petitioner's claim that DNA is nothing more than a high-tech fingerprint used for identification purposes were correct (which it is not), it would potentially justify taking, analyzing, and databanking the DNA of huge classes of people who have never even been arrested. Most directly, Petitioner and many of its *amici* cite this Court's decision in *Hiibel* v. *Sixth Judicial District Court of Nevada, Humboldt County*, 542 U.S. 177 (2004), as support for using DNA to "identify" arrestees. *Hiibel*, however, held that the police may require persons whom they merely *detain* based on less than probable cause to identify themselves; if *Hiibel* justifies seizing DNA from persons *arrested* for crimes, it must also justify seizing DNA from every person who is merely detained.

And if, as the State suggests, DNA sampling is simply a better, non-intrusive way to identify individuals, the pressure will inevitably grow to expand its use beyond law-enforcement. We must identify ourselves when we file our taxes, or simply because we are residents of the United States in a census year. Americans in these situations have no more right to "conceal" their identity (as the government puts it) than do arrestees or detainees. Even when it is not an absolute requirement, identifying ourselves to the government is often a necessary part of participating in modern life – enrolling in school, applying for a drivers' license, passport, or firearm license, sitting for the bar, or entering federal buildings. Many of these already require fingerprinting, which – like DNA testing –

was initially used only in the criminal-justice system.[24]

As our nation's experience with fingerprints and Social Security Numbers demonstrates, government identification databases tend to expand far beyond the uses that were initially used to justify them and authorized by the legislature.[25] In less than 25 years CODIS has expanded from including samples only from persons convicted of serious felonies, to the now-routine collection of DNA from persons convicted of any felony, to samples from persons who have not been convicted of anything but have merely been arrested for minor offenses.[26] There is little reason to think that this rapid

---

[24] *See* Christina Buschmann, *Mandatory Fingerprinting of Public School Teachers: Facilitating Background Checks or Infringing on Individuals' Constitutional Rights?*, 11 Wm. & Mary Bill Rts. J. 1273, 1279-82 (2003). Some states require that aid recipients submit to fingerprinting. *See* Kaaryn Gustafson, *The Criminalization Of Poverty*, 99 J. Crim. L. & Criminology 643, 675 (2009).

[25] *See supra* n.23; Carolyn Puckett, The Story of the Social Security Number, Social Security Bulletin, Vol. 69 No. 2, 55, (2009), available at http://www.ssa.gov/policy/docs/ssb/v69n2/v69n2p55.html ("Created merely to keep track of the earnings history of U.S. workers for Social Security entitlement and benefit computation purposes, [the Social Security Number] has come to be used as a nearly universal identifier.").

[26] *See* Michael T. Risher, Racial Disparities in Databanking of DNA Profiles, in Sheldon Krimsky and Kathleen Sloan, eds., *Race and the Genetic Revolution* (Columbia Univ. Press 2011) at 49-50. These changes have increased the number of persons who are required to provide samples in California by fivefold. *See id.* at 50.

expansion will stop here. The brightest, most fundamental line in our criminal-justice system is the one that separates those who have been convicted of a crime from those who are presumed innocent. If the government's authority to take DNA without a warrant or even individualized suspicion is allowed to cross that line, "then it's hard to see how we can keep the database from expanding to include everybody." *Kincade*, 379 F.3d at 872 (Kozinski, J., dissenting).

B. Taking and databanking DNA from persons not convicted of a crime does not improve CODIS's effectiveness at solving crime

Although DNA evidence and databanks have revolutionized the criminal-justice system, the benefits of adding samples taken from arrestees, rather than persons actually convicted, is limited, in large part because it results in the collection of many samples from people who are innocent or who have committed only minor crimes where DNA evidence is rarely involved.

1. Studies from the U.K. and RAND show that arrestee testing fails to significantly improve database hit rates

The experience in the United Kingdom is instructive on the limitations of arrestee DNA collection. The U.K. has the second-largest DNA database in the world and has had an arrestee-testing program since April 2004. In 2006, the

British Home Office evaluated its program and concluded that "the number of matches obtained from the Database (and the likelihood of identifying the person who committed the crime) is 'driven' primarily by the number of crime scene profiles loaded on the Database," rather than from the number of arrestee/offender profiles.[27] The number of DNA database matches peaked in 2002-03, just before the UK started taking DNA at arrest, and then decreased in 2003-04 and 2004-05.[28] Not coincidentally, the number of new crime-scene DNA profiles loaded into the system also peaked in 2002-03. A 2006 report by Dr. Helen Wallace further analyzed these statistics and concluded that arrestee testing had failed to lead to increased hits:

> [I]t is the number of DNA profiles from crime scenes added to the [National DNA Database]—not the number of individuals' profiles retained—that largely determines the number of detections. This analysis is further confirmed by comparing the DNA-detection rate with those from previous years; this number has remained relatively constant for the years for which figures are available (38% in

---

[27] Great Britain Home Office, Forensic Science and Pathology Unit, *DNA Expansion Programme 2000-2005: Reporting Achievement* (2005), at 10 ¶ 32, available at http://www.statewatch.org/news/2006/jan/uk-DNA-database.pdf.

[28] *Id.* at 12; *see id.* at 6. The U.K. had previously taken samples only from persons actually charged with crimes. *See id.*

> 2002/2003, 43% in 2003/2004 and 40% in 2004/2005), whereas the number of individuals' profiles kept in the NDNAD has expanded rapidly during this period (from 2 million in 2002/2003 to 3 million in 2004/2005). This implies that detections have increased since 1999 because more crime-scene DNA profiles have been loaded, not because there have been more detections per crime-scene DNA profile. If adding or keeping more DNA from individuals rather than from crime scenes were important, the DNA detection rate—the likelihood of making a detection—would have increased as the NDNAD expanded.[29]

Dr. Wallace submitted a declaration in the *Haskell* case that updated her research, concluding that "it is likely that California's expansion of mandatory DNA testing to all adult felony arrestees . . . will not lead to a significant increase in the number of crimes being solved."[30]

The RAND Corporation reached the same conclusion in a 2010 report finding that:

---

[29] Helen Wallace, *The UK National DNA Database: Balancing Crime Detection, Human Rights and Privacy, European Molecular Biology Organization Report 7(SI)* (July 2006), available at http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1490298.

[30] *Haskell* v. *Brown*, No. 3:09-cv-04779-CRB (N.D. Cal.), Dkt. 19, Declaration of Helen Wallace, at ¶ 29.

> database matches are more strongly related to the number of crime-scene samples than to the number of offender profiles in the database. This suggests that "widening the net," which research indicates has only a minimal deterrent effect, might be less cost-effective than allocating more effort to samples from crime scenes.[31]

None of the briefs filed by supporters of arrestee testing presents any independent studies that contradict the RAND report or the U.K. study. In fact, the only one of them that even attempts to present statistical support for arrestee testing is the brief of California and other states, which claims that arrestee testing has "more than doubled the crime-solving efficacy" of its database. Br. of California and Other States at 8. But the district court in *Haskell*, which had before it the actual California data through November 30, 2009, as well as additional data from government witnesses, specifically found to the contrary. *Haskell I*, 677 F. Supp. 2d at 1200-01 ("arrestee submissions contribute to the solution of crimes, but not to the same degree as convicted offender submissions."). More recently, the California Court of Appeal also examined the documents that California presents here and rejected its argument that arrestee testing is effective at solving more crimes than testing only

---

[31] RAND 2010 at 18, available at http://www.rand.org/content/dam/rand/pubs/technical_reports/TR918.pdf.

after conviction. *See Buza*, 129 Cal. Rptr. 3d at 776-77.

The RAND report also found that California's focus on adding more known samples – rather than crime-scene samples – has led to a decrease in its databank's efficacy. RAND 2010 at 20. Indeed, in comparison with other large states, most of which have much narrower laws, RAND noted that "California is anomalous in the relatively low number of investigations aided for such a large number of offender profiles." *Id.* at 19. In light of these and other factors, it concluded that "a more effective means of increasing hit rates is to increase the number of crime-scene profiles uploaded into the database rather than continue to add more suspects and arrestees (and convicts to lesser crimes) to the database net." *Id.* at 20.

The data that California presents are completely consistent with this conclusion. The increase in hits that it has experienced correlates directly to the tripling in size of its *crime-scene* database, which grew from 15,348 in January 2007 to 23,450 in December 2008 (just before the start of arrestee testing) to 50,752 as of November 2012.[32] California's analysis completely ignores this crucial

---

[32] *Compare* Cal. Dep't of Justice, Jan Bashinski DNA Laboratory Monthly Statistics, November 2012 updated monthly at http://oag.ca.gov/sites/all/files/pdfs/bfs/Monthly.pdf? with *Appellees' Response to Appellants' Request for Judicial Notice in Haskell II* (Sept. 10, 2012) at 24 of 63 and 63 of 63, available on the Ninth Circuit's website at http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000584.

fact, as well as research discussed above, and instead credits arrestee testing for its increased number of hits. This alone makes the limited data that California has chosen to present useless in evaluating the efficacy of arrestee testing.

Finally, "one must be cautious about equating more database matches with improved public protection." RAND 2010 at 18. As one of the original CODIS architects explained in a declaration submitted in *Haskell*:

> Some hits have been held at the databank laboratory; some hits have sat on an investigator's desk; some hits have been useless . . . ; some hits are from cases where the suspect had been identified and only a confirmation is desired (i.e., not a 'cold hit'). . . . Unfortunately, we cannot know the proportion of hits that result in assisting convictions[.][33]

2. Petitioner's and its *amici*'s anecdotal evidence of efficacy do not support arrestee DNA collection

In the absence of research or statistics to support their claims that arrestee testing is effective at solving crimes, several of Petitioner's *amici* instead present what they claim are examples of

---

[33] *Haskell* v. *Brown*, No. 3:09-cv-04779-CRB (N.D. Cal.), Dkt. 17, Declaration of Bruce Bedowle, at ¶ 26.

arrestee-testing success stories. But the district court in *Haskell* had an opportunity to examine many of these cases and case-studies – including the reports from Denver, Chicago, and Maryland, as well as the Chester Turner and Katie Sepich cases cited by several *amici* – and accorded them "little weight," because "mandatory testing at these offenders' first convictions would have generated the same result." *Haskell I*, 677 F. Supp. 2d at 1201 (internal quotation marks omitted). For example, although several *amici* raise the Turner case to demonstrate that arrestee testing is useful, the reality is that Turner had been *convicted* of at least one felony long before he was required to provide a DNA sample following a more recent arrest. *See Haskell II*, 669 F.3d at 1077 (Fletcher, J., dissenting). The reason Turner escaped detection for so long was that he was not required to provide a sample when he was convicted.

The claim that arrestee testing would have prevented the wrongful conviction of another man for Turner's crimes is nonsensical – that innocent man was convicted based on flawed *blood-typing* evidence.[34] *Any* DNA testing, had it been available, would have shown that the blood found at the scene was not his. No database of any sort was necessary.

In fact, DNA databases are generally not necessary for exonerating the innocent. *See* RAND 2010 at 14. In any case where the police collect and analyze DNA from a crime scene, the same probable

---

[34] *See* DNA Saves Br. at 16; http://www.innocenceproject.org /Content/David_Allen_Jones.php.

cause that supported arrest will necessarily support a warrant to collect that arrestee's DNA for comparison with that crime-scene evidence. And, as this case shows, the government will have to collect and analyze this additional sample so that it can directly compare the resulting profile to the crime-scene evidence even if it has already obtained a database hit.[35] Even if the government for some reason chooses not to collect DNA from the arrestee, an innocent arrestee is free to provide a sample for independent analysis and comparison with the crime-scene evidence. *Cf.* 18 U.S.C. § 3600(a)(9) (applicant for DNA exoneration *must* agree to provide sample for comparison). Exoneration will occur when the two samples are analyzed and the direct comparison of the resulting profiles shows that they do not match, regardless of whether either profile is added to a database. *See House* v. *Bell*, 547 U.S. 518, 540-41 (that DNA found on victim belonged to her husband, not the habeas petitioner, was "of central importance" to claim of actual innocence). In fact, in more than half of DNA exonerations the actual perpetrator is never identified, which means

---

[35] *See* Md. Code Regs. § 29.05.01.12; FBI, Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System (CODIS hit is "used to establish probable cause" so that law enforcement can "obtain a court order authorizing the collection of a known biological reference sample from the offender"), available at http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet.

DNA databanks could not have been used to identify the actual culprits.[36]

The evidence in *Haskell* also debunks the claim that arrestee testing solved the murder of Katie Sepich and exonerated a person falsely accused of that crime. The court reviewed these claims and concluded that they did not support the argument that arrestee testing could exonerate the innocent. *See Haskell I*, 677 F. Supp. 2d at 1201 n.12 (finding no "evidence that the taking of arrestees' DNA has led to either an increase in exonerations or a decrease in false accusations/convictions"); *see also Haskell II*, 669 F.3d at 1077 (Fletcher, J., dissenting). As a declaration that DNA Saves founder Jayann Sepich submitted in *Haskell* makes clear, the man who killed her daughter was not released from custody until *after* he was convicted; seizing his DNA at conviction would have been just as effective as taking it at arrest.[37]

---

[36] http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php.

[37] *Haskell* v. *Brown*, No. 3:09-cv-04779-CRB (N.D. Cal.), Dkt. 34, Declaration of Jayann Sepich, at ¶ 8 ("Avilla was convicted of the aggravated burglary in March 2004, but was released on bond before sentencing and promptly disappeared."). It also appears that the murderer was at large for only a few months; most of the delay in linking him to the murder was simply due to the state's failure to take a sample from him even after he had been sent to prison. *See* KFOX14, *Police Get Break In KatieSepich Murder Case*, available at http://www.kfoxtv.com/news/news/police-get-break-in-katie-sepich-murder-case/nKLbt/.

The purported examples supporting arrestee testing that post-date the district court's decision in *Haskell* suffer from similar flaws. For example, the brief of California and other states discusses the arrest of Garcia Torres for the death of Sierra LaMar but fails to acknowledge that Torres had been convicted even before the arrest that led to his DNA being taken.[38] Similarly, Diego Alcalde was convicted of a crime soon after the murder to which his DNA was later connected.[39]

The reality is that even these anecdotal examples – carefully selected by the proponents of arrestee testing and often based on incomplete media reports – provide little support for arrestee testing. Although there are doubtless some cases where taking DNA at arrest would solve a crime that would not be solved by taking a sample at conviction, so would taking DNA from any similarly-sized group of individuals. Law enforcement doubtless discovered probative evidence in many cases by conducting broad automobile searches whenever

---

[38] California discusses this fact on its own website. *Arrestee DNA Leads to Arrest of Suspect in Sierra LaMar Abduction*, available at http://oag.ca.gov/sites/all/files/pdfs/bfs/garcia_torres_sierra_lamar_abduction.pdf ("In 2010, Garcia-Torres had been arrested for a felony crime while he was on probation following a misdemeanor conviction.").

[39] Tom McGhee, *Chase Suspect was in Denver Jail 6 Months*, Denver Post, Jan. 30, 2008, available at http://www.denverpost.com/perspective/ci_8118708?source=pkg . The State's brief even admits that another of its examples – Shelby Shamlin – had multiple convictions long before the felony arrest that resulted in his providing a DNA sample.

they arrested the driver, but that did not make those searches constitutional, even though drivers and passengers have reduced privacy rights. *See Arizona* v. *Gant*, 556 U.S. 332, 343 nn.2-3 (2009) (collecting examples). Even if there are some cases where taking DNA at arrest does solve a crime, this cannot justify a blanket rule allowing warrantless searches of hundreds of thousands of arrestees every year, particularly given the serious privacy interests at stake.

III. BECAUSE MANY JURISDICTIONS HAVE DNA COLLECTION LAWS EVEN BROADER THAN MARYLAND'S, THEY PRESENT ADDITIONAL CONSTITUTIONAL QUESTIONS BEYOND THOSE RAISED IN THIS CASE

The question presented in this case is limited to whether the State may "collect and analyze DNA from people arrested *and charged* with *serious* crimes." As discussed above, the Court should answer this question in the negative. It is also essential to understand that other state laws are broader in scope than Maryland's law and therefore raise critical constitutional issues in their own right. Specifically, the laws of the federal government and states like California allow collection from persons who have not been charged with anything; who may have been merely arrested for much less serious crimes than are covered by Maryland's law; and whose samples will be analyzed, uploaded to CODIS, and retained indefinitely even if they are never charged with any crime, or are charged and acquitted. Those laws, of course, are not before the

Court. Nevertheless, they caution against a broad constitutional ruling in this case unless it is to invalidate arrestee testing in general.

A. Many jurisdictions take DNA at arrest for minor crimes

At least thirteen states take DNA at every felony arrest.[40] In California, for example, collection is required for crimes such as unlawfully subleasing a car, stealing $250 worth of fruits or other crops from a field, or simple drug possession.[41] In fact, three of the four named plaintiffs in *Haskell* were forced to provide DNA samples when they were arrested during non-violent political demonstrations. *See Haskell II*, 669 F.3d at 1066-67 (Fletcher, J., dissenting). Many of these offenses are "wobblers," meaning that although they support a felony arrest with mandatory DNA collection, they will often bring at most misdemeanor charges. *See* Cal. Dep't of Justice Information Bulletin 2008-BFS-02 at 2-3[42]; *see generally People* v. *Statum*, 28 Cal. 4th 682, 685 (2002).

---

[40] *See* http://www.dnaresource.com/documents/statequalifyingoffenses2011.pdf (table summarizing state DNA collection laws).

[41] *See* Cal. Penal Code §§ 487(b)/489, 570; Cal. Health & Safety Code §§ 11350, 11377; *see also* Cal. Penal Code §§ 17(a), 18 (defining felonies); Cal. Penal Code § 296(a)(2)(C) (requiring DNA collection from "any adult person arrested or charged with any felony offense.").

[42] Available at http://oag.ca.gov/sites/all/files/pdfs/bfs/69IB_121508.pdf?.

Federal law is even broader in that it covers persons arrested for misdemeanors.[43] This can include the following crimes on federal land:

- bathing at a faucet not provided for that purpose. 36 C.F.R. § 261.16(c);
- possession of alcohol. 36 C.F.R. § 261.58(bb);
- walking a pet with a leash longer than six feet. 36 C.F.R. § 261.16(j);
- distributing handbills without permission. 38 C.F.R. § 1.218(a)(9);
- illegal parking. 38 C.F.R. § 1.218(a)(12).[44]

Taking DNA from persons arrested for improper leafleting or parking in front of a driveway raises concerns well beyond the case before this Court.

---

[43] 28 C.F.R. § 28.12(b) ("Any agency of the United States that arrests or detains individuals or supervises individuals facing charges shall collect DNA samples from individuals who are arrested, facing charges, or convicted"); *see id.* § 28.12(f)(2) (inclusion of samples in CODIS). *See also* 42 U.S.C. § 14135a(a)(1)(A) (authorizing, regulation). The Department of Justice specifically rejected a request from New Hampshire for "an exception to DNA-sample collection based on detention for minor, nonviolent offenses." 73 Fed. Reg. 74932, 74941.

[44] All of these offenses are misdemeanors, punishable by up to 6 months in jail. *See* 38 U.S.C. § 901; 16 U.S.C. § 551; 36 C.F.R. § 261.1b.

B. Many jurisdictions take DNA from persons never charged with a crime

Maryland's law also differs from those of other jurisdictions in only authorizing collection from persons charged with, not merely arrested for, a crime. Other jurisdictions mandate collection "immediately following arrest, or during the booking . . . process or as soon as administratively practicable after arrest," with the samples analyzed as soon thereafter as possible. Cal. Penal Code § 296.1 (a)(1)(A); *see* 42 U.S.C. § 14135a(a)(1)(A); 28 C.F.R. § 28.12(b).

In 2011, there were 292,231 felony arrests in California.[45] Of those, 9,780 individuals (3.3%) were released by the police without referral for prosecution. Prosecutors refused to charge an additional 45,988 (15.7%) individuals.[46] Thus, 19% of those arrested for a felony were never charged with an offense. If California only seized DNA from persons actually charged with a crime, none of these 55,768 individuals would have provided a DNA sample. But under California law, all were forced to surrender their DNA though either the police or, in most cases, the district attorney had determined

---

[45] Cal. Dep't of Justice, *Crime in California 2011* at 50 (Table 38A, Dispositions of Adult Felony Arrests 2006-2011), available at http://oag.ca.gov/sites/all/files/pdfs/cjsc/publications/candd/cd11/cd11.pdf?.

[46] *Id.*

there were insufficient grounds for prosecution.[47] This lack of prosecutorial, much less judicial, oversight means that every individual police officer has the unreviewable discretion to force an individual to provide a DNA sample, which will be analyzed and uploaded to CODIS even if the person is never even charged with a crime: "there is no check on the discretion of the officers who make the arrests that create the opportunity for DNA sampling." *Buza*, 129 Cal. Rptr. 3d at 780-81; *cf. Gerstein* v. *Pugh*, 420 U.S. 103, 117 (1975) (noting that "a conscientious decision that the evidence warrants prosecution affords a measure of protection against unfounded detention").

C. Many jurisdictions analyze DNA samples without any judicial finding of probable cause

A judicial finding of probable cause is often what separates a lawful search or seizure from a warrantless one that presumptively violates the Fourth Amendment. Of course, Maryland's law is not rendered constitutional by the provision that the State may not test DNA until after a judicial finding of probable cause, because probable cause to arrest a person for a crime does not suggest that there is probable cause to seize his DNA. *See Zurcher* v. *Stanford Daily*, 436 U.S. 547, 556-57 & n.6 (1978).

---

[47] In California, as in most states, the decision to charge a person with a crime is made by a prosecuting attorney, not the police, although *amici* understand that in Maryland the police have the authority to file charges following a warrantless arrest. *See* Md. Rules, Rule 4-202(b), 4-211(b)(2).

But the requirement that samples not be analyzed until after judicial review does impose some check on the unbridled discretion and authority of a police officer to use an improper arrest as a means to obtain and databank an individual's DNA profile.

Jurisdictions like California and the federal government have no such safeguard. This means that:

> [e]ven if the arrest is subsequently determined by a judicial officer to have been without sufficient cause, the DNA sample will have been taken and a profile developed, and the use of the profile and preservation of the sample will continue unless and until the arrestee succeeds in the cumbersome process of having them expunged. Without questioning the integrity of most law enforcement officers, it is not difficult to think that [California's] DNA Act might provide an incentive to pretextually arrest a person from whom the police desire a DNA sample.

Buza, 129 Cal. Rptr. 3d at 780.

And the government has no legitimate reason to seize and search a person's DNA before judicial review of the arrest, which must occur "as soon as is reasonably feasible, but in no event later than 48 hours after arrest." *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 57 (1991). Just as the "State has no legitimate interest in detaining for

extended periods individuals who have been arrested without probable cause," *id.* at 55, it has absolutely no legitimate interest in analyzing and databanking their DNA without some sort of probable cause. The Fourth Amendment requires that any such determination be made by a magistrate. *See Gerstein*, 420 U.S. at 114 ("Once the suspect is in custody . . . the reasons that justify dispensing with the magistrate's neutral judgment evaporate."). Although a judicial determination of probable cause to arrest cannot justify Maryland's law because it does not imply probable cause to take a DNA sample, the complete absence of any judicial involvement under the federal or California statutes poses a particularly egregious threat to Fourth Amendment rights.

D. Expunging DNA samples in many jurisdictions is difficult

California, like most states, lacks automatic expungement and in fact makes it unreasonably difficult to obtain expungement. This means that in California, people who are arrested but not convicted will have "their DNA profiles remain in the state and federal databanks, and their DNA specimens and samples in the DOJ laboratory, in perpetuity, unless and until they are able to successfully negotiate a lengthy and burdensome expungement process that is far from guaranteed to succeed." *Buza*, 129 Cal. Rptr. 3d at 782-83. This process includes a mandatory six-month waiting period; there is no right to counsel, and the court has the unreviewable discretion to deny expungement. *See id.* at 758-59, 769 n.16; Cal. Penal Code §§ 299(b)-(c);

Haskell I, 677 F. Supp. 2d at 1191-92. For people who are arrested but not charged, the statute requires that they wait until the statute of limitations has run before they can even begin the process. *See* Cal. Penal Code § 299(b)(1); *Buza*, 129 Cal. Rptr. 3d at 758-59. Even individuals who have been found factually innocent by a judge must follow this lengthy procedure. *See* Cal. Penal Code § 299(b)(3). Finally, there is no provision for notifying the innocent arrestee of whether expungement has occurred, and no remedy if the government wrongfully fails to expunge a sample. *See id.* § 299(d); *cf. id.* § 299.5(i)(2)(b).

This lack of an automatic-expungement provision has huge practical consequences. Approximately one-third of those arrested on suspicion of a felony in California – 33% or 96,410 individuals in 2011 – are never convicted of anything.[48] Under the Maryland law now before this Court, less than half of them would have their DNA taken in the first place (because they were not charged with a crime), even fewer would have their sample analyzed (because there was no judicial finding of probable cause), and none of them would have their samples retained. But under California law, all of them will have their DNA seized, analyzed, uploaded to CODIS, and maintained in perpetuity unless they successfully manage to obtain expungement.

---

[48] Cal. Dep't of Justice, *Crime in California 2011* at 50 (Table 38A, Dispositions of Adult Felony Arrests 2006-2011), available at http://oag.ca.gov/sites/all/files/pdfs/cjsc/publications/candd/cd11/cd11.pdf?.

Thus, while *amici* strongly believe that Maryland's law is unconstitutional, the Court should be aware that the laws of many other jurisdictions sweep even more broadly and therefore present additional constitutional concerns that may not be present here.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

ERIC A. LONG
PETER C. MEIER
JAMIE L. WILLIAMS
Paul Hastings LLP
55 Second Street
Twenty-Fourth Floor
San Francisco, CA 94105
(415) 856-7000

MICHAEL T. RISHER
Counsel of Record
American Civil Liberties
Union Foundation
of Northern California
39 Drumm Street
San Francisco, CA 94111
(415) 621-2493
mrisher@aclunc.org

STEVEN R. SHAPIRO
EZEKIEL R. EDWARDS
BRANDON J. BUSKEY
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10025
(212) 549-2500

DAVID R. ROCAH
American Civil Liberties
Union Foundation
of Maryland
3600 Clipper Mill Road
Suite 350
Baltimore, MD 21211
(410) 889-8555

Counsel for Amici Curiae

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-207

SUPREME COURT, U.S.
FILED
JAN 2 - 2013

In the Supreme Court of the United States

STATE OF MARYLAND, *Petitioner,*

v.

ALONZO JAY KING, JR., *Respondent.*

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR THE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, PUERTO RICO, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING AS *AMICI CURIAE* SUPPORTING PETITIONER

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
SUSAN DUNCAN LEE
Acting State Solicitor General

ENID A. CAMPS
Deputy Attorney General
Counsel of Record
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5976
Email: Enid.Camps@doj.ca.gov
Counsel for Amici Curiae

[Additional Counsel Listed On Inside Cover]

Library of Congress
Law Library

ADDITIONAL COUNSEL FOR AMICI CURIAE

Luther Strange
Attorney General
State of Alabama
501 Washington Ave.,
Montgomery AL 36130
(334) 242-7300

Michael C. Geraghty
Attorney General
State of Alaska
P.O. Box 110300
Juneau, AK 99811
(907) 465-2133

Tom Horne
Attorney General
State of Arizona
1275 West Washington Street
Phoenix, AZ 85007
(602) 542-5025

Dustin McDaniel
Attorney General
State of Arkansas
323 Center Street, Suite 1100
Little Rock, AR 72201
(501) 682-2007

John W. Suthers
Attorney General
State of Colorado
1300 Broadway, 10th Floor
Denver, CO 80203
(303) 866-4500

Kevin T. Kane
Chief State's Attorney
State of Connecticut
300 Corporate Place
Rocky Hill, CT 06067
(860) 258-5800

Joseph R. Biden, III
Attorney General
State of Delaware
Department of Justice
820 N. French Street
Wilmington, DE 19801
(302) 577-8400

Irvin B. Nathan
Attorney General
District of Columbia
441 4th Street, NW
Washington, DC 20001
(202) 727-3400

Pamela Jo Bondi
Attorney General
State of Florida
The Capitol, PL-01
Tallahassee, FL 32399-1050
(850) 245-0140

Samuel S. Olens
Attorney General
State of Georgia
40 Capitol Sq.
Atlanta, GA 30334
(404) 656-3300

David M. Louie
Attorney General
State of Hawaii
425 Queen Street
Honolulu, HI 96813
(808) 586-1500

Lawrence G. Wasden
Attorney General
State of Idaho
P. O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

Lisa Madigan
Attorney General
State of Illinois
100 W. Randolph St.
12th Floor
Chicago, IL 60601
(312) 814-3698

Gregory F. Zoeller
Attorney General
State of Indiana
IGC-South, Fifth Floor
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6201

Thomas J. Miller
Attorney General
State of Iowa
1305 E. Walnut Street
Des Moines, IA 50319
(515) 281-5164

Derek Schmidt
Attorney General
State of Kansas
120 SW 10th Avenue
2nd Floor
Topeka, KS 66612-1597
(785) 296-2218

Jack Conway
Attorney General
Commonwealth of Kentucky
700 Capital Avenue
Suite 118
Frankfort, KY 40601
(502) 696-5300

James D. "Buddy" Caldwell
Attorney General
State of Louisiana
P. O. Box 94005
Baton Rouge, LA 70804-9005
(225) 326-6200

William J. Schneider
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333 - 0006
(207) 626 - 8599

Martha Coakley
Attorney General
State of Massachusetts
One Ashburton Place
Boston, MA 02108
(617)727-2200

Bill Schuette
Attorney General
State of Michigan
P. O. Box 30212
Lansing, MI 48909
(517) 373-1110

Lori Swanson
Attorney General
State of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther
King Jr. Blvd.
St. Paul, MN 55155-1609
(651) 296-6169

Jim Hood
Attorney General
State of Mississippi
P. O. Box 220
Jackson, MS. 39205
(601) 359-3692

Chris Koster
Attorney General
State of Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101
(573) 751-3321

Steve Bullock
Attorney General
State of Montana
P. O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

Jon Bruning
Attorney General
State of Nebraska
P. O. Box 98920
Lincoln, NE 68509
(402) 471-2682

Catherine Cortez Masto
Attorney General
State of Nevada
100 North Carson Street
Carson City, NV 89701
775-684-1112

Michael A. Delaney
Attorney General
State of New Hampshire
33 Capitol Street
Concord, NH 03301
(603) 271-1202

Jeffrey S. Chiesa
Attorney General
State of New Jersey
Richard J. Hughes
Justice Complex
30 W. Market St.
Trenton, NJ 08625
(609) 292-4930

Gary K. King
Attorney General
State of New Mexico
P. O. Drawer 1508
Santa Fe, NM 87504-1508
(505) 827-6000

Eric T. Schneiderman
Attorney General
State of New York
120 Broadway, 25th floor
New York, NY 10271
(212) 416-8020

Roy Cooper
Attorney General
State of North Carolina
P. O. Box 629
Raleigh, NC 27602
(919) 716-6400

Wayne Stenehjem
Attorney General
State of North Dakota
600 E. Boulevard Avenue
Bismarck, ND 58505-0040
(701) 328-2210

Michael DeWine
Attorney General
State of Ohio
30 E. Broad Street
17th Floor
Columbus, OH 43215

E. Scott Pruitt
Attorney General
State of Oklahoma
313 NE 21st Street
Oklahoma City, OK 73105
(405) 521-3921

Ellen F. Rosenblum
Attorney General
State of Oregon
1162 Court St. N.E.
Salem, OR 97301
(503) 378-4400

Linda L. Kelly
Attorney General
State of Pennsylvania
1600 Strawberry Square
Harrisburg, PA 17120
(717) 787-3391

Guillermo Somoza-Colombani
Attorney General
Commonwealth of Puerto Rico
GPO Box 902192
San Juan, PR 00902
(787) 722-5755

Peter F. Kilmartin
Attorney General
State of Rhode Island
150 South Main Street
Providence, RI 02903
(401) 274-4400

Alan Wilson
Attorney General
State of South Carolina
P. O. Box 11549
Columbia, SC 29211
(803) 734-3970

Marty J. Jackley
Attorney General
State of South Dakota
1302 East Highway 14
Suite 1,
Pierre, SD 57501-8501
(605) 773-3215

Robert E. Cooper, Jr.
Attorney General
State of Tennessee
425 Fifth Avenue North
Nashville, TN 37243-3400
(615) 741-6474

Greg Abbott
Attorney General
State of Texas
P. O. Box 12528
Austin, TX 78711
(512) 463-2100

Mark L. Shurtleff
Attorney General
State of Utah
Utah State Capitol
Suite #230
P. O. Box 142320
Salt Lake City,
UT 84114-2320
(801) 538-9600

William H. Sorrell
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609-1001
(802) 828-3173

Kenneth T. Cuccinelli, II
Attorney General
State of Virginia
900 East Main Street
Richmond, VA 23219
(804) 786-7240

Robert M. McKenna
Attorney General
State of Washington
1125 Washington Street SE
P. O. Box 40100
Olympia, WA 98504-0100
(360) 753-6200

Darrell V. McGraw, Jr.
Attorney General
State of West Virginia
State Capitol, Room 26-E
Charleston, WV 25305
(304) 558-2021

J.B. Van Hollen
Attorney General
State of Wisconsin
P. O. Box 7857
Madison, WI 53707-7857
(608) 266-1221

Gregory A. Phillips
Attorney General
State of Wyoming
123 Capitol Building
Cheyenne, WY 82002
(307) 777-7841

QUESTION PRESENTED

Does the Fourth Amendment allow the States to collect and analyze DNA from people arrested and charged with serious crimes?

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

Laws That Authorize Collection of DNA Database Samples from Felony Arrestees Significantly Improve the Criminal Justice System and Are Constitutional 3

A. Collecting DNA Database Samples from Felony Arrestees Serves the Compelling Government Interest of Solving Crimes and Saving Lives 4

B. Collecting DNA Database Samples from Felony Arrestees is a Minimal Additional Intrusion in Light of Other Identification Information Already Lawfully Obtained Upon Arrest 15

C. The States Have Enacted Use-Restricted, Confidential and Effective Statutory Programs for Collecting DNA Database Samples from Felony Arrestees 21

1. CODIS requirements and state and federal laws safeguard the confidentiality and privacy of forensic information in state and national DNA databases 24

TABLE OF CONTENTS
(continued)

Page

2. Statutory use restrictions on DNA programs are sufficient to allay informational privacy concerns 30

3. Speculation is not part of a Fourth Amendment analysis 32

CONCLUSION 34

TABLE OF AUTHORITIES

Page

CASES

Albright v. *Oliver*
510 U.S. 266 (1994) 16
Alfaro v. *Terhune*
98 Cal.App.4th 492 (2002) 22, 25
Atwater v. *City of Lago Vista*
532 U.S. 318 (2000) 16
Banks v. *United States*
490 F.3d 1192 (10th Cir. 2007) 22
Bell v. *Wolfish*
441 U.S. 520 (1979) 7
Boroian v. *Mueller*
616 F.3d 60 (1st Cir. 2010) 22
County of Riverside v. McLaughlin
500 U.S. 44 (1991) 16, 23
Davis v. *Mississippi*
394 U.S. 721 (1969) 23
District Attorney's Office for the Third Judicial Dist. v. *Osborne*
557 U.S. 52 (2009) 3, 26
Ewing v. *California*
538 U.S. 11 (2003) 6
Gerstein v. *Pugh*
420 U.S. 103 (1975) 16
Haskell v. *Brown*
677 F. Supp. 2d 1187 (N.D. Cal. 2009) 5
Haskell v. *Harris*
669 F.3d 1049 (9th Cir. 2012) 4, 5, 21
Hiibel v. *Sixth Judicial Dist. Ct. of Nevada*
542 U.S. 177 (2004) 16

TABLE OF AUTHORITIES
(continued)

Page

Illinois v. *Caballes*
543 U.S. 405 (2005) 17
Illinois v. *McArthur*
531 U.S. 326 (2001) 3
Johnson v. *Quander*
440 F.3d 489 (D.C. Cir. 2006) 23, 31
Jones v. *Murray*
962 F.2d 302 (4th Cir. 1992) 17
Loder v. *Municipal Court*
17 Cal. 3d 859, 553 P.2d 624 (1976) 16, 17
Michigan Dept. of State Police v. *Sitz*
496 U.S. 444 (1990) 7
NASA v. *Nelson*
131 S. Ct. 746 (2011) 21, 31, 32
Nat'l Treasury Employees Union v. *Von Raab*
489 U.S. 656 (1989) 7, 20
Nicholas v. *Goord*
430 F.3d 652 (2d Cir. 2005) 22
Paul v. *Davis*
424 U.S. 693 (1976) 16
People v. *King*
82 Cal. App.4th 1363; 99 Cal.Rptr. 220
(2000) 22
People v. *McInnis*
6 Cal. 3d 821, 494 P.2d 690 (1972) 20
Perez-Torres v. *California*
42 Cal.4th 136, 164 P.3d 583 (2007) 20
Rakas v. *Illinois*
429 U.S. 128 (1978) 17

TABLE OF AUTHORITIES
(continued)

Page

Rise v. *Oregon*
59 F.3d 1156 (9th Cir. 1995) 23
Samson v. *California*
547 U.S. 843 (2006) 3, 6, 15
Smith v. *United States*
324 F.2d 879 (D.C. Cir. 1963) 16
United States v. *Amerson*
483 F.3d 73 (2d Cir. 2005) 5, 15
United States v. *Diaz-Castenada*
494 F.3d 1146 (9th Cir. 2007) 17, 18
United States v. *Dionisio*
410 U.S. 1 (1973) 23
United States v. Jones
132 S. Ct. 945 (2012) 21
United States v. *Karo*
468 U.S. 705 (1984) 32
United States v. *Kelly*
55 F.2d 67 (2d Cir. 1932) 16, 17
United States v. *Kincade*
379 F.3d 813 (9th Cir. 2004) ..... passim
United States v. *Knights*
534 U.S. 112 (2001) 15
United States v. *Kraph*
285 F.2d 647 (3d Cir. 1961) 17
United States v. *Mitchell*
652 F.3d 387 (3d Cir. 2011) ..... passim
United States v. *Salerno*
481 U.S. 739 (1987) 6

TABLE OF AUTHORITIES
(continued)

Page

United States v. *Thomas*
No.10-CR-6172, 2011 U.S. Dist. LEXIS 45333 (W.D.N.Y. Feb. 14, 2011) 31
United States v. *Watson*
423 U.S. 411 (1976) 32
Vernonia Sch. Dist. 47j v. *Acton*
515 U.S. 646 (1995) 20, 32
Virginia v. *Moore*
553 U.S. 164 (2008) 23
Whalen v. *Roe*
429 U.S. 589 (1977) 7, 31
Wilson v. *Collins*
517 F.3d 421 (6th Cir. 2008) 32

STATUTES

28 C.F.R. § 28.12 ..... 5, 19
42 U.S.C. § 14131 et seq. 24
42 U.S.C. § 14131(a)(1) 28
42 U.S.C. § 14132(a)(1) 25
42 U.S.C. § 14132(b)(3) 27, 29
42 U.S.C. § 14132(b)(3)(A) 25
42 U.S.C. § 14132(b)(3)(C) 27
42 U.S.C. § 14132(d)(2)(A) 27
42 U.S.C. § 14133 29
42 U.S.C. § 14133(b) 27
42 U.S.C. § 14135a(a) 5
Ala. Code § 36-18-25(c)(1) 4
Ala. Code § 36-18-27 24
Alaska Stat. § 44.41.035(b)(6) 4

TABLE OF AUTHORITIES
(continued)

Page

Alaska Stat. § 44.41.035(f) 24
Ariz. Rev. Stat. Ann. § 13-610(I) 24
Ariz. Rev. Stat. Ann. § 13-610(K),(L) 4
Ark. Code Ann. § 12-12-1006(2) 4
Ark. Code Ann. §§ 12-12-1112-1114 24
Cal. Penal Code §§ 296(a)(2), 296.1(a)(1) 4
Cal. Penal Code § 299.5 ..... 24, 28
Cal. Penal Code § 1203.018 (c) 15
Colo. Rev. Stat. Ann. §§ 16-11-102.4, 16-23-104 ... 24
Colo. Rev. Stat. Ann. § 16-23-103(1)(a) 4
Conn. Gen. Stat. Ann. § 54-102g(a) 4
Conn. Gen. Stat. Ann. §§ 54-102i(b), 54-102j 24
DNA Identification Act of 1994 24
Federal DNA Identification Act of 1994 29
Fla. Stat. Ann § 943.325(2)(g)(2)(c) 4
Fla. Stat. Ann § 943.325(14) 24
730 Ill. Rev. Stat. Chapter 5, ¶ 5-4-3(a-3.2) 4
730 Ill. Rev. Stat. Chapter 5, ¶ 5-4-3(f) 24
Kan. Stat. Ann. § 21-2511(i) 24
Kan. Stat. Ann. § 21-2511(e)(2) 4
La. Rev. Stat. Ann. § 15:609(A)(1) 4
La. Rev. Stat. Ann. §§ 15:612, 616 24
Md. Code Ann., Pub. Safety §§ 2-502(c)(4), 2-508 24
Md. Code Ann., Pub. Safety § 2-504(a)(3) 4
Mich. Comp. Laws Ann. § 28.175a(1) 24
Mich. Comp. Laws Ann. § 750.520m(1)(a) 5
Minn. Stat. § 299C.105(1)(a)(1) 5
Minn. Stat. § 299C.155(3) 24
Mo. Rev. Stat. § 650.055 5

TABLE OF AUTHORITIES
(continued)

Page

Mo. Rev. Stat. § 650.055(7) 24
N.C. Gen. Stat. § 15A-266.3A..... 5
N.C. Gen. Stat. §§ 15A-266.8,266.12 24
N.D. Cent. Code § 31-13-03..... 5
N. D. Cent. Code §§ 31-13-05 24
N.J. Rev. Stat. § C.53:1-20.20 5
N.J. Rev. Stat. §§ 53:1-20.24,20.27 24
N.M. Stat. Ann. § 29-16-6 (B)..... 5
N.M. Stat. Ann. § 29-16-8(A), (B)..... 24
Ohio Rev. Code Ann. § 109.573(E) 24
Ohio Rev. Code Ann. § 2901.07(B)(1)..... 5
Okla. Stat. Title 74, § 150.27a(A) 5
Okla. Stat. Title 74, § 150.27a(D) 24
S.C. Code Ann. § 23-3-620(A)..... 5
S.C. Code Ann. § 23-3-650(A)..... 24
S.D. Codified Laws § 23-5A-5.2..... 5
S. D. Codified Laws §§ 23-5A-22, 23-5A-23, 23-5A-25..... 24
Tenn. Code Ann. § 38-6-113(d)..... 24
Tenn. Code Ann. § 40-35-321(e)..... 5
Tex. Gov't Code Ann. §§ 411.147(c)..... 24
Tex. Gov't Code Ann. § 411.1471 5
Utah Code Ann. § 53-10-403(1)(c)..... 5
Utah Code Ann. § 53-10-406(3)(a) 24
Va. Code Ann. § 19.2-310.2:1 5
Va. Code Ann. §§ 19.2-310.4.5..... 24
Vt. Stat. Ann. Title 20, § 1933(a)(2)..... 5
Vt. Stat. Ann. Title 20, §§ 1937, 1938, 1941..... 24

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

Fourth Amendment ..... passim

OTHER AUTHORITIES

61 Fed. Reg. 37425, 37495-98 (July 18, 1996) 24, 25, 27
73 Fed. Reg. 74932, 74934-36, 74942 (Dec.10, 2008) 19
155 Cong. Rec. S12904-S12907 (daily ed. Dec. 10, 2009) 29
Bureau of Justice Statistics, U.S. Dep't of Justice, *Violent Felons in Large Urban Counties* 1 (July 2006) 6
Cal. Dep't of Justice, *Criminal Justice Profiles, Crime Clearances and Clearance Rates by Category and Crime* (2010) 6
Cal. Dep't of Justice, *Criminal Justice Profiles, Crimes and Crime Rates by Category and Crime* (2010) 6
Cal. Sec'y State, Voter Information Guide, text of Prop.69,§ II(e), *Findings and Declarations of Purpose*. 135 (Nov.2, 2004) 14
Dept. of Forensic Science, State of Virginia, *DNA Data Bank Statistics* 14
Douglas Hares, Letter to the Editor, *Expanding the CODIS Core Loci in the United States*, 6 Forensic Sci Int'l Genet. e52-4, 135 (Jan 2012) 26

TABLE OF AUTHORITIES
(continued)

Page

Jay Siegel and Susan Narveson, *Why Arrestee DNA Legislation Can Save Indiana Taxpayers Over $50 Million Per Year* (Jan. 2009) 14
John M. Butler, Advanced Topics in Forensic DNA Typing: Methodology 228-229 (2011) 27
John M. Butler, Forensic DNA Typing: Biology, Technology, and Genetics of STR Markers 244 (2d ed. 2005) 26
John M. Butler, Fundamentals of Forensic DNA Typing 6 (2010) 30
Kenneth R. Moses, *Automated Fingerprint Identification System (AFIS)*, in *The Fingerprint Sourcebook*, Ch. 6-11/12 (Nat'l Inst. Justice 2011) 18
National DNA Index System (NDIS) Privacy Act Notice 24
Robin Cheryl Miller, Annotation, *Validity, Construction, and Operation of State DNA Database Statutes*, 76 A.L.R.5th 239 (2012) 31
Sara H. Katsanis and Jennifer K. Wagner, *Characterization of the Standard and Recommended CODIS Markers*, J.Forensic Sci. (2012) 26
Simon A. Cole, *Suspect Identities, A History of Fingerprinting and Criminal Identification* 8 (2001) 17

INTEREST OF AMICI CURIAE

Twenty-eight States and the Federal Government have enacted statutes similar to Maryland's, authorizing collection and analysis of DNA samples from felony arrestees for use in a forensic identification database.

These statutes make it possible for law enforcement to solve a vast amount of violent crime. Typically, these statutes require collection of a minimally intrusive buccal (cheek) swab DNA sample after arrest at booking, in addition to photographs and fingerprints. These laws help protect communities from repeat offenders who jeopardize public safety and devastate lives. Collecting DNA database samples at the earliest stages of criminal proceedings also helps minimize the number of innocent persons who are needlessly investigated for crimes they did not commit. The States seek to uphold these carefully constructed and effective programs.

The reasoning of the Maryland Court of Appeals, if adopted, would override sound state legislative judgments striking a balance between public safety and arrestee privacy. Upholding the decision also would undermine long-settled tenets of Fourth Amendment jurisprudence that have guided the States for decades in the use of fingerprints and other identification information collected from criminal offenders.

SUMMARY OF ARGUMENT

Because DNA testing has proved so important to criminal justice and public safety, the majority of state legislatures and the United States Congress have enacted statutes requiring felony arrestees to provide buccal swab samples for use in an identification database. These laws are constitutional.

Collecting forensic identification DNA samples from arrestees serves a compelling government interest in solving crime. Arrestee DNA database programs dramatically increase a state's ability to solve suspectless violent crimes and reduce recidivism by felony offenders. For example, California's database program has aided more criminal investigations in the past four years since felony arrestee sample collection began, than it had in the preceding 25 years combined when samples were collected from convicted offenders.

Collecting DNA database samples from arrestees also serves a compelling government interest in using incarceration powers sparingly. Arrestee DNA databases make the criminal justice system more accurate and just. DNA identifications help States distinguish between those who may safely be released and those who should be confined pending trial. And accurate DNA identifications can bring closure to crime victims more quickly.

Collecting a DNA database sample at the time of a felony arrest is reasonable under the Fourth Amendment. The States' interest is compelling. Felony arrestees have a diminished expectation of privacy in their identity. The procedure for collecting and analyzing DNA database samples is minimally

intrusive. State and federal use and confidentiality restrictions circumscribe DNA database operations. All States must meet federally established requirements for using the samples. Given that balance of interests in favor of the States, it is constitutionally insignificant whether a State collects samples before or after a judicial finding of probable cause or has an expungement procedure that is initiated by the State or by an arrestee. Speculation that statutory or technical security measures might fail has no place in the Fourth Amendment analysis.

ARGUMENT

LAWS THAT AUTHORIZE COLLECTION OF DNA DATABASE SAMPLES FROM FELONY ARRESTEES SIGNIFICANTLY IMPROVE THE CRIMINAL JUSTICE SYSTEM AND ARE CONSTITUTIONAL

In *District Attorney's Office for the Third Judicial Dist.* v. *Osborne*, 557 U.S. 52, 55 (2009), this Court recognized DNA testing's "potential to significantly improve both the criminal justice system and police investigative practices." State and federal statutes authorizing collection of DNA database samples from felony arrestees significantly improve the criminal justice system, contributing to its accuracy and integrity.

Arrestee DNA database programs pass Fourth Amendment scrutiny as reasonable under the applicable "totality of the circumstances" balancing test. See *Samson* v. *California*, 547 U.S. 843, 848-9, 855 n.4 (2006); *Illinois* v. *McArthur*, 531 U.S. 326, 330-31 (2001); *United States* v. *Mitchell*, 652 F.3d 387, 402-05 (3d Cir. 2011) (en banc) (federal program for collecting DNA database samples from arrestees

constitutional); *Haskell* v. *Harris*, 669 F.3d 1049, 1051-54 (9th Cir. 2012) (*Haskell II*) (finding California's 2004 State Ballot Initiative consistent with the Fourth Amendment), *vacated* by reh'g en banc granted 686 F.3d 1121 (9th Cir. 2012) and proceedings stayed by subsequent order, pending resolution of *Maryland* v. *King*.

For DNA database programs, the operative factors for the constitutional balancing analysis include the compelling government interests served by collecting DNA samples from felony arrestees, the minimal intrusion of sample collection, the arrestee's diminished expectation of privacy, and the limits on the scope of the search imposed by statutory and regulatory use and disclosure restrictions. A proper balancing of these factors shows that arrestee DNA database laws are reasonable and therefore permissible under the Fourth Amendment.

A. Collecting DNA Database Samples from Felony Arrestees Serves the Compelling Government Interest of Solving Crimes and Saving Lives

Twenty-eight States and the Federal Government have enacted statutory programs for collecting forensic identification DNA database samples from some category of felony arrestees.[1]

---

[1] Ala. Code § 36-18-25(c)(1); Alaska Stat. § 44.41.035(b)(6); Ariz. Rev. Stat. Ann. §13-610(K),(L); Ark. Code Ann. §12-12-1006(2); Cal. Penal Code §§ 296(a)(2), 296.1(a)(1); Colo. Rev. Stat. Ann. § 16-23-103(1)(a); Conn. Gen. Stat. Ann. §54-102g(a); Fla. Stat. Ann § 943.325(2)(g)(2)(c); 730 Ill. Rev. Stat. Ch. 5, Para. 5-4-3(a-3.2); Kan. Stat. Ann. § 21-2511(e)(2); La. Rev. Stat. Ann. § 15:609(A)(1); Md. Code Ann., Pub. Safety § (continued...)

Typically, pursuant to these laws, an arrestee provides a buccal swab sample at the same time he or she provides other identification information to a law enforcement officer at booking. Buccal swab collection is less intrusive than brushing one's teeth. Collection can be accomplished by placing a toothbrush-sized swab inside one's own mouth and gently brushing it against the inner cheek. See Bureau of Forensic Services, Cal. Dep't of Justice, *FAQ: Collection Mechanics, Q.1,* http://oag.ca.gov/bfs/prop69/faqs (last visited Dec.26, 2012) [hereinafter Cal. DOJ]; *Haskell* v. *Brown*, 677 F. Supp. 2d 1187, 1190 (N.D. Cal. 2009) (*Haskell I)*; *United States* v. *Amerson,* 483 F.3d 73, 84-86 (2d Cir. 2005) (cheek swab is lesser physical invasion than blood sample, which has long been recognized as minimal).

Arrestee DNA database programs have become a substantial part of modern police work because they help States address pressing problems related to criminal offender identification and public safety. Solving crimes committed by unknown offenders is one of law enforcement's major challenges. For example, California saw more than half of the state's

---

(...continued)
2-504(a)(3); Mich. Comp. Laws Ann. § 750.520m(1)(a); Minn. Stat. §299C.105(1)(a)(1); Mo. Rev. Stat. § 650.055. 1.(1); N.J. Rev. Stat. § 53:1-20.20; N.M. Stat. Ann. § 29-16-6 (B); N.C. Gen. Stat. § 15A-266.3A; N.D. Cent. Code § 31-13-03; Ohio Rev. Code Ann. § 2901.07(B)(1); Okla. Stat. tit. 74, § 150.27a(A); S.C. Code Ann. § 23-3-620(A); S.D. Codified Laws § 23-5A-5.2; Tenn. Code Ann. § 40-35-321(e); Tex. Gov't Code Ann. § 411.1471; Utah Code Ann. § 53-10-403(1)(c); Vt. Stat. Ann. tit. 20, § 1933(a)(2); Va. Code Ann. § 19.2-310.2:1; 42 U.S.C. §14135a(a) & 28 C.F.R. §28.12.

one million violent crimes committed from 2001 through 2005 go unsolved.[2]

In investigating these crimes, law enforcement professionals build on their knowledge that arrestees are far more likely than the general public to be repeat criminal offenders.[3] About seventy percent of violent felons have a prior arrest record, and fifty-seven percent have at least one prior arrest for a felony. Bureau of Justice Statistics, U.S. Dep't of Justice, *Violent Felons in Large Urban Counties* 1 (July 2006) (NCJ 205289), *available at http://bjs.ojp.usdoj.gov/content/pub/pdf/vfluc.pdf.* A reliable way of connecting the identities of new arrestees with the evidence in unsolved crimes gives law enforcement a powerful tool for interrupting the cycle of violent recidivism. Cf. *Ewing* v. *California*, 538 U.S. 11, 26 (2003) ("Recidivism is a serious public safety concern in California and throughout the nation."); *United States* v. *Salerno*, 481 U.S. 739, 749 (1987) ("The government's interest in preventing crime by arrestees is both legitimate and compelling.").

---

[2] See Criminal Justice Statistics Ctr., Cal. Dep't of Justice, *Criminal Justice Profiles, Crimes and Crime Rates by Category and Crime* (2010), http://oag.ca.gov/sites/all/files/pdfs/cjsc/prof10/1/00.pdf (State Table 1); Criminal Justice Statistics Ctr., Cal. Dep't of Justice, *Criminal Justice Profiles, Crime Clearances and Clearance Rates by Category and Crime* (2010),http://oag.ca.gov/sites/all/files/pdfs/cjsc/prof10/1A/00.pdf (State Table 1A).

[3] California has a high rate of recidivist crime. See *Samson* v. *California*, 547 U.S. at 843, 853 (as of November 30, 2005, California had recidivism rate between 68 and 70 percent).

Collecting DNA database samples from arrestees substantially enhances law enforcement's ability to solve suspectless violent crimes. The information gained through DNA databases also enables the justice system to better distinguish between low level offenders and more dangerous offenders for purposes of setting a reasonable bail or permitting own-recognizance (OR) release in the pretrial setting.

Statistical validation is not necessary to establish the constitutional reasonableness of DNA database statutes.[4] Nevertheless, the overwhelming number of crimes solved as a result of these programs firmly supports the government's compelling interest in collecting DNA identification samples from felony arrestees. California's data[5] is illustrative:

---

[4] See *Michigan Dept. of State Police* v. *Sitz*, 496 U.S. 444, 453-55 (1990) (rejecting the extensive "effectiveness" review conducted by the Michigan court in evaluating sobriety checkpoints and in any event finding 1.5 percent success rate was sufficient to justify the checkpoint intrusion on all drivers); cf. *Nat'l Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 674 (1989) (noting the "mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity"); *Bell* v. *Wolfish*, 441 U.S. 520, 532, 548-49 (1979) (upholding body cavity searches of pre-trial detainees although petitioners proved only "one instance" where contraband was found during such search); *Whalen* v. *Roe*, 429 U.S. 589, 597-98 (1977) ("Nothing in the Constitution prohibits a State from reaching . . . a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.").

[5] Lead amicus California has one of the most established DNA database programs in the country, with more arrestee DNA database samples uploaded to the National DNA Index

(continued...)

(1) Collecting forensic identification DNA database samples from offenders at felony arrest, rather than after conviction has more than doubled the crime-solving efficacy of California's database program.

(a) California's average number of monthly "hits" between known offender DNA profiles and DNA samples from unsolved crimes increased from 183 per month in 2008 (the year preceding full implementation of sample collection at felony arrest) to more than 400 hits per month by July 2011. From April 2012 to December 2012, California's database program averaged more than 430 hits per month. California's database program has aided twice as many investigations (18,526) in the last four years since arrestee DNA collection began in January 2009, as it did in the preceding 25 years combined (8,307) using its then-existing convicted offender databases. See Cal. DOJ, *FAQ: Effects of the All Adult Arrestee Provision, Q2*, http://oag.ca.gov/bfs/ prop69/faqs (last visited Dec. 26, 2012).

(b) Immediately prior to January 2009, when California began collecting DNA samples from all adult felony arrestees, California's convicted offender DNA database program cleared or aided the investigation of about 35 percent of the unsolved DNA cases submitted to it. With the advent of DNA

(...continued)
System (NDIS) than any other state. See FBI Laboratory Services, U.S. Dep't of Justice, *CODIS-NDIS Statistics*, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/ndis-statistics (last visited Dec. 26, 2012); see also *Haskell I*, 677 F. Supp. 2d at 1190. California's experience exemplifies the utility of arrestee DNA databases nationwide.

database sample collection from felony arrestees, that clearance and investigations aided rate rose to 67.9 percent by November 30, 2012. This has translated to an increase in more than 14,800 matches between unsolved crimes and offender profiles and over 18,500 investigations aided since January 1, 2009. Of the 27,302 unsolved California case DNA profiles added between January 1, 2009, and December 1, 2012, California's DNA database program has aided in the investigation of over 50 percent of those cases. *Id.*

(2) Collecting DNA samples at booking serves other important government interests, including accurately identifying felony arrestees, supervising misdemeanor probationers, and distinguishing between low-level and dangerous arrestees for custody purposes.

California's data also dispel a common misconception that the States have no need to collect DNA samples upon arrest for "low-level" felony crimes.

The California Department of Justice analyzed the criminal records of 100 California felony arrestees who were linked by their DNA booking samples to unsolved rapes, robberies or murders ("violent crimes"). The study sought to identify records of individuals who had no prior felony convictions at the time their DNA samples were collected. See Cal. DOJ, *Arrestee Hits to Violent Crime: Survey Results for 100 Cases,* http://oag.ca.gov/sites/all/files/pdfs/bfs/arrestee.pdf (last visited Dec. 26, 2012). The study found that:

(a) The majority of hits to unsolved violent crimes came in connection with arrests for "low level" felonies, such as fraud and drug offenses. *Id.*

(b) In 79 percent of the cases reviewed, the felony arrest at which DNA was collected was not the first arrest. *Id.*

(c) In about 35 percent of the cases reviewed, the arrestees were on misdemeanor probation or under other state supervision at the time they committed the rape, robbery or murder. *Id.*

(d) In 82 percent of the cases, the unsolved violent crimes were committed before the offense for which the person was arrested and a DNA sample was obtained. Of the twelve individuals who committed the rape, robbery or murder after the collectable offense, three of the arrestees' cases had been dismissed, seven cases had resulted in a misdemeanor conviction, and one case was prosecuted in conjunction with the murder offense linked to the arrestee sample. One has no disposition of record.

(3) The California Department of Justice also found that, following an August 2011 intermediate California appellate decision which temporarily halted the program for collecting DNA upon felony arrest, the number of crimes solved by matches to the DNA database decreased by about 200 cases per month—until the program was restored. See Cal. DOJ, *FAQ: Effects of the All Adult Arrestee Provision, Q.2*,http://oag.ca.gov/bfs/prop69/faqs# & http://oag.ca.gov/sites/all/files/pdfs/bfs/arrestee_vs_co_submissions_since_2009_042412.pdf (last visited Dec. 26, 2012).

Numbers alone, however, do not convey the full impact of arrestee DNA database programs. Behind every number is a human story, a case in which a buccal swab sample collected from a felony arrestee played a crucial role in solving a violent crime. See

e.g., Cal. DOJ, *News Releases (July 13, 2010)*, http://oag.ca.gov/news/press_release?id=1949&p=3&y=2010. Examples include:

(a) *Sierra LaMar Case.* Fifteen-year-old Sierra LaMar was abducted on her way to school in March 2012. Law enforcement in Santa Clara County, California, had no leads on her kidnapper, and no hope of finding her alive, until DNA evidence from her belongings, found by the side of a road, was matched to the DNA database sample obtained from Antolin Garcia Torres on an unrelated arrest. This lead enabled law enforcement to recover additional critical evidence in Garcia Torres's car that linked him to Sierra—evidence that otherwise likely would have been destroyed. The California Department of Justice DNA Database lab returned a hit within two hours of receiving the evidence. Local authorities were able to put Garcia Torres under immediate surveillance, and had a hope of finding Sierra alive, though she has not yet been found. Prior to the DNA lead, local authorities, lacking any other suspects, had embarked on interviewing all 270 of the area's registered sex offenders. Based on the DNA evidence, however, local authorities arrested Garcia Torres, and have linked him to three other assault crimes. See Cal. DOJ, *FAQ: Effects of the All Adult Arrestee Provision, Q2,* http://oag.ca.gov/bfs/prop69/faqs (last visited Dec. 26, 2012).

(b) *Octavio Castillo Case.* Castillo's DNA sample was obtained in 2011 following his arrest for a crime involving a stolen credit card, for which he was released on his own recognizance. Following his release, Castillo's sample was matched to an unsolved Santa Cruz County kidnapping and sodomy of a young woman—a case with no other

leads. The hit enabled law enforcement to revoke Castillo's OR, thereby preventing him from reoffending. In September 2012, Castillo was convicted of felony crimes and sentenced to prison. See Cal. DOJ, *FAQ: Effects of the All Adult Arrestee Provision, Q2,* http://oag.ca.gov/bfs/prop69/faqs (last visited Dec. 26, 2012).

(c) *Shelby Glenn Shamblin Case.* Sixty-seven year-old Elizabeth Crossman was raped and strangled in 1980. In 2002, police in Hemet, California submitted vaginal swabs from the crime for analysis and upload to the Combined DNA Index System (CODIS), but no DNA match resulted. In October 2010 Shelby Glenn Shamblin was arrested for felony drug possession and submitted a required DNA database sample at booking. Shamblin's DNA was matched to the semen samples from the 1980 Crossman homicide two months after Shamblin had been granted diversion on the 2010 drug offenses. Though Shamblin had done odd jobs for the Crossmans and was interviewed as part of the initial investigation, there had been insufficient evidence linking him to the 1980 crime. Between the 1980 murder and his 2010 drug arrest, Shamblin had been arrested in 1988 and 1989 on drug crimes that today would require a DNA sample at booking in California. Shamblin was convicted of misdemeanor offenses in those cases, and has no felony convictions of record. Following the 2010 DNA match, Shamblin's diversion was terminated. He is now scheduled to stand trial on both the drug case and the murder case in 2013. See Cal. DOJ, *FAQ: Effects of the All Adult Arrestee Provision, Q2,* http://oag.ca.gov/bfs/prop69/faqs (last visited Dec. 26, 2012).

(d) *Diego Alcalde Case.* During the early morning hours of December 12, 1997, Susannah Chase, a 23-year-old student at the University of Colorado was attacked while walking home from a pizzeria. She was raped and beaten to death with a baseball bat. A DNA profile was developed from the seminal fluid collected from the victim, but police were unable to identify a suspect. Weeks after this murder, Diego Alcalde was twice arrested in Colorado for violent sexual assaults, but Colorado did not then have a law permitting DNA sample collection from arrestees. It was not until 2008 that Alcalde's forensic identification DNA record—which was obtained following a 2004 Wyoming kidnapping conviction—was matched to the 1997 homicide. Alcalde subsequently was convicted for Susannah Chase's murder. Had an arrestee DNA collection program been in effect in Colorado, the Chase homicide would have been solved ten years earlier and the Wyoming kidnapping would never have occurred. See *Man Found Guilty of Beating, Raping CU Student*, The Denver Channel.com (June 29, 2009) http://www.thedenverchannel.com/news/man-found-guilty-of-beating-raping-cu-student.[6]

Collecting DNA database samples at arrest rather than after felony conviction produces benefits

---

[6] DNA database samples from arrestees have become an important crime-solving tool even for States that do not have arrestee collection laws. For example, DNA database hits to California felony arrestees have solved more than 340 out-of-state crimes, mostly murders and sexual assault. Overall, CODIS had recorded 20,698 state-to-state hits as of June 2012. See FBI Laboratory Services, U.S. Dep't of Justice, *CODIS Brochure*, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis_brochure (last visited Dec. 26, 2012).

beyond closing old cases and preventing new ones. Victims are spared immeasurable fear and uncertainty that otherwise accompanies delay in apprehending the criminals who preyed on them. Like their compelling interest in solving crimes, States have a substantial interest in bringing "closure to countless victims of crime who long have languished in the knowledge that perpetrators remain at large." *United States* v. *Kincade*, 379 F.3d 813, 839 (9th Cir 2004).

Moreover, the speedy identification of criminal suspects through DNA matches makes criminal convictions more certain and reliable. If an arrestee has committed other unsolved crimes, those crimes can be prosecuted while witnesses and evidence can be located and memories are still fresh. Collecting samples as soon as possible after arrest also inures to the benefit of suspects who seek alibi witnesses who otherwise could be lost in the passage of time. Likewise, use of arrestee DNA databases more quickly focuses criminal investigations so that innocent persons are not needlessly investigated for crimes they did not commit.[7]

---

[7] See *e.g.*, Cal. Sec'y State, Voter Information Guide, text of Prop.69,§ H(e), *Findings and Declarations of Purpose* 135 (Nov.2,2004), *available at* http://vote2004.sos.ca.gov/voterguide/english.pdf (DNA sample collection at arrest helps "thwart criminal perpetrators from concealing their identities and thus prevent time-consuming and expensive investigations of innocent persons"); see also Jay Siegel and Susan Narveson, *Why Arrestee DNA Legislation Can Save Indiana Taxpayers Over $50 Million Per Year* (Jan. 2009), http://dnasaves.org/files/IN_DNA_Cost_Savings_Study.pdf; Dept. of Forensic Science, State of Virginia, *DNA Data Bank Statistics*, www.dfs.virginia.gov/statistics/index.cfm (last visited Dec. 26, 2012) (continued...)

Finally, DNA matches allow state officials to make better custody decisions. For example, in California, a new law gives custodial authorities discretion to release on OR, felony arrestees who cannot make bail within sixty days after arrest, subject to electronic monitoring. Cal. Penal Code § 1203.018 (c). Collecting DNA samples at arrest gives the custodian important information regarding the detainee's potential dangerousness before making the decision to release that person back into the community. Conversely, rehabilitated individuals are able to resume their daily lives at home.

For all of these reasons, the States' laws authorizing collection of DNA samples upon felony arrest are crucial to evolving criminal justice systems. These laws improve the justice system, save lives, and serve a compelling interest of the States.

B. Collecting DNA Database Samples from Felony Arrestees is a Minimal Additional Intrusion in Light of Other Identification Information Already Lawfully Obtained Upon Arrest

For Fourth Amendment purposes, there is a bright line between arrestees and "free" citizens who are entitled to "absolute liberty." See *Samson*, 547 U.S. at 848-49; *United States* v. *Knights*, 534 U.S.

(...continued)
(noting as of October 31, 2012, a total of 785 hits to its arrestee database had been obtained, with 117 of the hits to sexual assault cases); cf. *Amerson*, 483 F.3d at 83 n.9 (database serves broad societal interest "in minimizing wrongful accusations and convictions").

112, 119 (2001); *Albright* v. *Oliver*, 510 U.S. 266, 279 (1994) (Ginsburg, J., concurring). Arrestees have a diminished expectation of privacy in their identities. *Hiibel* v. *Sixth Judicial Dist. Ct. of Nevada*, 542 U.S. 177, 186 (2004) (knowledge of a suspect's identity "may inform an officer that a suspect is wanted for another offense"). In *Paul* v. *Davis*, 424 U.S. 693 (1976), this Court rejected an arrestee's claim that police disclosure of his name and photo in connection with a shoplifting arrest on a "flyer" to alert local merchants to possible shoplifters violated any constitutional privacy right, even when the arrestee was not convicted of the shoplifting offense. *Id.* at 712-13; see also *Loder* v. *Municipal Court*, 17 Cal. 3d 859, 864-65, 553 P.2d 624, 628-29 (1976). The arrestee did not have a constitutional right to keep his identity private.

It is well settled that probable cause to arrest permits police both to take an individual into physical custody and to obtain his identifying information. *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 54, 57-8 (1991) (recognizing administrative steps incident to arrest as including photographs and fingerprints); *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 354-55 (2000); cf. *United States* v. *Kelly*, 55 F.2d 67, 68 (2d Cir. 1932) (recognizing "slight interference" with the person involved in finger printing" justified by community good); *Smith* v. *United States*, 324 F.2d 879, 882 (D.C. Cir. 1963).

At booking, fingerprints, photographs, and palm prints are routinely collected in order to ascertain an arrestee's identity, which includes the individual's prior criminal offenses and links to other crimes through identification records. See J.A. 165 (Barbera, J., dissenting) (restricting "identity" to

include only name, age, address, and physical characteristics raises question "Why law enforcement would want to know a person's name, if not to know whether that person is linked to crime?"); see also *Jones* v. *Murray*, 962 F.2d 302, 306 (4th Cir. 1992) (arrestee's identification relevant to solve past and future crimes); *Loder*, 17 Cal. at 854-65, 553 P.2d at 628-29.[8]

A felony arrestee does not have a reasonable expectation of privacy in concealing his identity for other crimes he may have committed. The "expectation 'that certain facts will not come to the attention of authorities' is not the same as an interest in 'privacy that society is prepared to consider reasonable'." *Illinois* v. *Caballes*, 543 U.S. 405, 408-09 (2005); *Rakas* v. *Illinois*, 429 U.S. 128, 143-44 n.12 (1978); see also *United States* v. *Kraph*, 285 F.2d 647, 650 (3d Cir. 1961); *United States* v. *Diaz-Castenada*, 494 F.3d 1146,1153 (9th Cir. 2007).

Fingerprints have long been used to link arrestees to other unsolved crimes. In about 30 percent of cases, there is no prior fingerprint record on file for the individual arrested. In these cases the fingerprint is run against the unsolved case database in the first instance, and results are returned after

---

[8] Cf. *Kelly*, 55 F.2d at 69 (fingerprinting "has become especially important in a time when increased population and vast aggregations of people in urban centers have rendered the notoriety of the individual in the community no longer a ready means of identification"); Simon A. Cole, *Suspect Identities, A History of Fingerprinting and Criminal Identification* 8 (2001) ("In general, premodern societies already had an effective method of personal, and criminal identification: the network of personal acquaintance through which persons were 'known' in the memories and perceptions of their neighbors.").

two or more days when there is hit linking the print to an unsolved case. In other words, in about 30 percent of cases, when a fingerprint ID is run, the primary identification is a comparison only to "other crimes," not to a name already in the database. See Cal. DOJ, *FAQ: Effects of the All Adult Arrestee Provision, Q1 & Q3,* http://oag.ca.gov/bfs/prop69/faqs (last visited Dec. 26, 2012).

Forensic identification DNA database samples add an important tool for learning what the arrestee has no legitimate right to keep secret: his identity, including who he is and what he has done.[9]

After collection, DNA database samples are processed [10] by accredited laboratories that meet requirements established by the FBI for participation

---

[9] Based upon a 2005 survey, an estimated 50,000 suspects a year nationwide are identified through automated fingerprint searches, with burglary the offense most often solved. Kenneth R. Moses, *Automated Fingerprint Identification System (AFIS)*, in *The Fingerprint Sourcebook*, Ch. 6-11/12 (Nat'l Inst. Justice 2011), *available at* https://www.ncjrs.gov/pdffiles1/nij/225326.pdf. DNA identification databases more often link arrestees to sexual assault and other violent crime.

[10] DNA identification database samples have been processed in as few as two days in California, although around 30 days has been average. Future DNA typing systems are currently being prototyped under federal contract and those systems may provide typing results from offenders within a few hours of collection. For example, there are a number of United States Government Prototype Initiatives for Rapid DNA Profiling Systems in progress, which have the goal of conducting the analysis and matching of multiple DNA reference samples to existing DNA evidence profiles in one hour. See Cal. DOJ, *FAQ: Effects of the All Adult Arrestee Provision, Q2,* http://oag.ca.gov/bfs/prop69/faqs (last visited Dec. 26, 2012).

in the National DNA Index System. The resulting DNA identification profiles are compared to DNA profiles from unsolved crimes through database searches. CODIS enables federal, state, and local crime labs to exchange and compare DNA identification profiles electronically, thereby linking crimes to each other and to criminal offenders. See FBI Laboratory Services, U.S. Dep't of Justice, *CODIS Brochure,* http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis_brochure (last visited Dec. 26, 2012); see also *Kincade*, 379 F.3d at 818-20, 835. Like fingerprint ID programs, CODIS uses computer comparisons to identify forensic unknowns (e.g., crime scene samples) by reference to an individual's known identification sample that was seized, analyzed and stored pursuant to state or federal law.

Moreover, like photograph and palm print databases, forensic identification DNA databases are not superfluous to fingerprints even for record keeping purposes. DNA profiles can and do resolve conflicts in fingerprint and criminal history data, allowing states to recognize incorrect entries. See Cal. DOJ, *FAQ: Effects of the All Adult Arrestee Provision, Qs 1-3,* http://oag.ca.gov/bfs/prop69/faqs (last visited Dec. 26, 2012)(noting record corrections enabled by cross-checking DNA profile and fingerprint databases occur weekly); 28 C.F.R. § 28.12, 73 Fed. Reg. 74932, 74934-36, 74942 (Dec.10, 2008), *available at* http://www.gpo.gov/fdsys/pkg/FR-2008-12-10/pdf/E8-29248.pdf ("The collection of a DNA sample may also provide an alternative means of directly ascertaining or verifying an arrestee's identity, where fingerprint records are unavailable, incomplete, or inconclusive.").

Cross-checking information databases maximize the likelihood that a person can be identified reliably. As a district court observed: "The more ways the government has to identify who someone is, the better chance it has of doing so accurately." *Haskell I,* 677 F. Supp. 2d at 1199-2000. That States also take fingerprints and photographs at booking does not undermine the utility of an identification technique that is superior to these methods. Cf. *People* v. *McInnis,* 6 Cal. 3d 821, 826-27, 494 P.2d 690, 693 (1972) ("modern and scientific investigation techniques are to be encouraged"); *Perez-Torres* v. *California,* 42 Cal.4th 136, 138, 164 P.3d 583, 585 (2007) (plaintiff held for three weeks after arrest based upon incorrect entry in criminal history database).

As a constitutional matter, the limit on identification checks is that they may not be done in a manner that is arbitrary, capricious, or harassing. There is no requirement "that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment. . . ." *Vernonia Sch. Dist. 47j* v. *Acton*, 515 U.S. 646, 663-64 & n3 (1995). Even if law enforcement knows an individual by name, or has viewed a driver's license, it is not precluded from taking a photograph and fingerprints or other identification information. With the additional collection of a DNA sample and palm prints, identification checks are that much more accurate and complete. See *Comm. On Identifying the Needs of The Forensic Sci. Cmty, National Research Council of the Nat'l Acads., Strengthening Forensic Science in the United States: A Path Forward,* 7, 29 (Aug. 2009) (Document No: 228091), https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf ("With the exception

of nuclear DNA analysis, however, no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.").

The criminal justice system is improved by the use of careful and accurate identification programs, such as those currently used by twenty-eight States and the Federal Government.

C. The States Have Enacted Use-Restricted, Confidential and Effective Statutory Programs for Collecting DNA Database Samples from Felony Arrestees

State and federal requirements for DNA database testing and DNA profile disclosures ensure that the intrusion upon arrestee privacy interests is minimal. Cf. *United States* v. *Jones*, 132 S. Ct. 945, 962-63 (2012) (Alito, J. concurring in the judgment) (potentially intrusive technology can be appropriately circumscribed).

In *NASA* v. *Nelson*, 131 S. Ct. 746, 750, 761-63 (2011), this Court found that a "statutory or regulatory duty to avoid unwarranted disclosures" generally allays privacy concerns created by government "accumulation" of "personal information" for "public purposes." DNA database programs are appropriately circumscribed by statute and regulation. *Haskell II*, 669 F.3d at 1050 (noting restrictions on use and criminal penalties for misuse); *Mitchell*, 652 F.3d at 401, 404-13 ("In light of the restrictions built into the DNA profiling process, Mitchell's arguments that it constitutes a significant invasion of privacy are unavailing."); see

also *Alfaro* v. *Terhune*, 98 Cal.App.4th 492, 506-10 (2002) ("The extent of the intrusion is measured by reference to express limitations on the uses to which the specimens and samples may be put, and the governmental interests are assessed with respect to those specific uses.").

Forensic identification DNA sampling pursuant to confidential and use-restricted database programs "can only be described as minimally invasive—both in terms of the bodily intrusion it occasions, and the information it lawfully produces." *Kincade*, 379 F.3d at 837-38.

Due to substantial use and confidentiality restrictions, courts consistently have drawn valid comparisons between fingerprint and DNA databases, whether the database is comprised of samples from convicted offenders, arrestees, or both. *Id;* see also *Mitchell*, 652 F.3d at 404-13 (listing cases); *Boroian* v. *Mueller*, 616 F.3d 60, 65 (1st Cir. 2010) ("Under the DNA Act, DNA profiles currently function as identification records not unlike fingerprints, photographs, or social security numbers."); *Nicholas* v. *Goord*, 430 F.3d 652, 670 (2d Cir. 2005) ("Given the limits imposed on the collection, analysis, and use of DNA information by the statute . . . the intrusion on privacy effected by the statute [is] similar to the intrusion wrought by the maintenance of fingerprint records."); *Banks* v. *United States*, 490 F.3d 1178, 1192 (10th Cir. 2007); Cf. *People* v. *King*, 82 Cal. App.4th 1363, 1373-78; 99 Cal.Rptr. 220, 227-8 (2000) ("A warrant . . . provides little or no additional protection to personal privacy when . . . the circumstances justifying the [DNA] testing and the permissible limits of the intrusion are defined narrowly and specifically.").

Moreover, in light of the substantial and uniform national protections required by NDIS-CODIS, variations[11] in the States' arrestee collection procedures are constitutionally insignificant. See *Virginia* v. *Moore*, 553 U.S. 164, 172 (2008).

Like fingerprints, the circumscribed use of forensic identification DNA samples in confidential and restricted databases involves "none of the probing into an individual's private life and thoughts that marks an interrogation or search." *Davis* v. *Mississippi*, 394 U.S. 721, 726-28 (1969); see also *Rise* v. *Oregon*, 59 F.3d 1556, 1559-1560 (9th Cir. 1995); *United States* v. *Dionisio*, 410 U.S. 1, 13, 15 (1973) (seizure of voice exemplars not intrusive); *Mitchell*, 652 F.3d at 411; *Johnson* v. *Quander*, 440 F.3d 489,498 (D.C. Cir. 2006).

---

[11] For example, Maryland's law permits sample analysis only after arraignment and requires state-initiated expungement of a sample collection if "charges are determined to be unsupported by probable cause." States such as Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Florida, Kansas, Louisiana, Michigan, Missouri, New Jersey, North Dakota, Ohio, Oklahoma, South Carolina, and South Dakota, in addition to the federal government, do not require a judicial finding of probable cause for DNA database sample collection after a valid arrest. Similarly, the federal government and most states, including California require the arrestee to initiate expungement. See Cal. DOJ, *FAQ: Getting Expunged or Removed from the CAL-DNA Data Bank*, http://oag.ca.gov/bfs/prop69/faqs# (last visited Dec. 26, 2012). Maryland's law is only one of many responses which a state may have to its own ability to process data and utilize information systems. Cf. *County of Riverside*, 500 U.S. at 53-4 (recognizing a "practical compromise" between the rights of individuals and the realities of law enforcement).

1. CODIS requirements and state and federal laws safeguard the confidentiality and privacy of forensic information in state and national DNA databases

All of the States that have enacted laws for collecting DNA samples from arrestees include provisions that restrict disclosure of the DNA records. [12] The federal government has set standards [13] for all participating laboratories, providing additional assurance that DNA database programs are consistent with constitutional principles. Significantly, CODIS requires states to use validated, standardized, and generally accepted laboratory methods for sample analysis, as well as to

---

[12] Ala. Code §36-18-27; Alaska Stat. §44.41.035(f); Ariz. Rev. Stat. Ann. §13-610(I) ; Ark. Code Ann. §§12-12-1112-1114; Cal. Penal Code §299.5(a), (f); Colo. Rev. Stat. Ann. §§16-11-102.4, 16-23-104; Conn. Gen. Stat. Ann. §§54-102i(b), 54-102j; Fla. Stat. Ann §943.325(14); 730 Ill. Rev. Stat. Ch. 5, Para. 5-4-3(f); Kan. Stat. Ann. §21-2511(i); La. Rev. Stat. Ann. §§15:612, 616; Md. Code Ann., Pub. Safety §§2-502(c)(4), 2-508; Mich. Comp. Laws Ann. §28.175a(1); Minn. Stat. §299C.155(3); Mo. Rev. Stat. §650.055(7); N.J. Rev. Stat. §§53:1-20.24,20.27; N.M. Stat. Ann. §29-16-8(A), (B); N.C. Gen. Stat. §§15A-266.8,266.12; N. D. Cent. Code §§31-13-05., 31-13-06.; Ohio Rev. Code Ann. §109.573(E); Okla. Stat. tit. 74, §150.27a(D); S.C. Code Ann. §23-3-650(A); S. D. Codified Laws §§23-5A-22, 23-5A-23, 23-5A-25; Tenn. Code Ann. §38-6-113(d); Tex. Gov't Code Ann. §§411.147(c), .153(a); Utah Code Ann. §53-10-406(3)(a); Vt. Stat. Ann. tit. 20, §§1937, 1938, 1941; Va. Code Ann. §§19.2-310.4,5.

[13] *See* e.g., DNA Identification Act of 1994, 42 U.S.C. § 14131 et seq.; National DNA Index System (NDIS) Privacy Act Notice, 61 Fed. Reg. 37425, 37495-98 (July 18, 1996); http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet.

maintain quality control systems in order to use federal CODIS software for information sharing.

CODIS, based upon statutory and regulatory authority, addresses privacy issues in several ways:

(1) Only limited "DNA identification" testing is permitted. 42 U.S.C. §§14132(a)(1), 14132(b)(3)(A); see also *Alfaro*, 98 Cal.App.4th at 508 (rejecting assertion that "identification purposes" is vague and finding term clear based on statutory context and CODIS participation); SWGDAM Executive Board Considerations for Claims that the CODIS Core Loci are 'Associated' with Medical Conditions/Diseases at http://www.swgdam.org/ at News and Updates/ Publications ("The 13 core loci were selected as law enforcement markers to be used for identification purposes only.")

(2) The FBI, the agency responsible for the administration of the National DNA Index System, designed the CODIS software to operate without personal identifiers. Participating laboratories are not permitted to upload case or donor names with analyzed samples to CODIS. A DNA profile is tracked by number, with the name of the donor associated with a record only after a "confirmed match." The records are coded, and only the originating laboratory retains the capability to identify an individual by name after the "confirmed match." See 61 Fed. Reg. 37496 (July 18, 1996) ("NDIS does not contain case-related or other personally identifying information about the person from whom the DNA sample was collected. . . . [P]ersonal information such as names are not found in NDIS"); *Mitchell*, 652 F.3d at 399-401; *Kincade*, 379 F.3d at 819.

(3) The 13 core loci (DNA markers) required by CODIS for forensic DNA testing were purposely selected because they are not associated with any known physical or medical characteristics—providing further assurance against the use of offender DNA profiles for reasons other than forensic identification. *Kincade,* 379 F.3d at 818-19; see John M. Butler, Forensic DNA Typing: Biology, Technology, and Genetics of STR Markers 244 (2d ed. 2005) (CODIS loci are in non-coding regions of the DNA and are not known to have any association with a genetic disease); [14] Sara H. Katsanis and Jennifer K. Wagner, *Characterization of the Standard and Recommended CODIS Markers*, J.Forensic Sci. (2012) *available as pre-print at* http://onlinelibrary.wiley.com/doi/10.1111/j.1556-4029.2012.02253.x/pdf, *available as abstract at* http://onlinelibrary.wiley.com/doi/10.1111/j.1556-4029.2012.02253.x/abstract ("This study provides clarification ... independent of the forensic scientific community—that the CODIS profiles provide identification but not sensitive or biomedically relevant information.").[15]

---

[14] Professor John Butler "is said to have written 'the canonical text on forensic DNA typing.'" *Osborne*, 557 U.S. at 82.

[15] Any new loci added to CODIS must comply with existing statutory and regulatory requirements, and may not be diagnostic or predictive of medical conditions or disease. See FBI Laboratory Services, U.S.Dep't of Justice, *Planned Process and Timeline for the Implementation of Additional CODIS Core Loci*,http://www.fbi.gov/about-us/lab/biometric-analysis/codis/planned-process-and-timeline-for-implementation-of-additional-codis-core-loci (last visited Dec. 26, 2012); Douglas Hares, Letter to the Editor, *Expanding the CODIS Core Loci in the United States*, 6 Forensic Sci Int'l Genet. e52-4, 135 (Jan 2012); see also

(continued...)

(4) Disclosure of DNA profile information and access to CODIS data is limited to criminal justice agencies for "law enforcement identification purposes." 42 U.S.C. §§ 14132(b)(3), 14133(b). Although a defendant's own profile may be provided to him in connection with a charged case, defendants are not authorized to access other database profile information. 42 U.S.C. § 14132(b)(3)(C); see also 61 Fed. Reg. 37497 (July 18, 1996) ("criminal justice agencies with direct access to CODIS must agree to . . . restrict access to DNA samples and data").

(5) There are significant penalties for misuse of information or unauthorized disclosure outside of law enforcement identification purposes. Additionally, law enforcement access to the federal index may be cancelled for failure to meet the quality control and privacy requirements of federal law. 42 U.S.C. §§ 14132(c), 14135e(c).

(6) A state's access to CODIS is conditional on filing approved expungement procedures for non-qualifying samples with NDIS. 42 U.S.C. § 14132(d)(2)(A).[16]

(...continued)
Cal. DOJ, *FAQ: Retention of Offender Samples*, http://oag.ca.gov/bfs/prop69/faqs (last visited Dec. 26, 2012). If a marker were to become associated with a disease condition it would be removed from use. See John M. Butler, Advanced Topics in Forensic DNA Typing: Methodology 228-229 (2011).

[16] Although they do not have automatic expungement with an open-ended time frame for that to occur, States such as California have developed other solutions consistent with due process for expunging samples. California's expedited and streamlined process for expunging samples and profiles, for example, entails an arrestee filling out a two-page form available on California's website. California DOJ can process
(continued...)

(7) Annual audit procedures and NDIS reviews of external audits ensure that participating laboratories adhere to CODIS requirements, including use and disclosure restrictions. See FBI Laboratory Services, U.S. Dep't of Justice, *Quality Assurance Standards for DNA Databasing Laboratories,* http://www.fbi.gov/about-us/lab/biometric-analysis/codis/qas-standards-for-forensic-dna-testing-laboratories-effective-9-1-2011 (last visited Dec. 26, 2012); 42 U.S.C. §14131 (a)(1).

The FBI also has incorporated safeguards for the DNA information in the operation of the NDIS, in which all fifty States participate. See FBI Laboratory Services, U.S. Dep't of Justice, *CODIS and NDIS Fact Sheet,* http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet (last visited Dec. 26, 2012). These operational safeguards include: CODIS software must be on

---

(...continued)
such requests quickly when the petitioner supplies basic information (name, date of birth, social security number) requested on the form. Cal. DOJ, *FAQ: Getting Expunged or Removed from the CAL-DNA Data Bank,* http://oag.ca.gov/bfs/prop69/faqs (last visited Dec. 26, 2012). Thus, expungements typically occur within two to four weeks of receiving a valid request. An individual can ask the court for a hearing if not satisfied with the result. California also has statutory provisions that address privacy concerns related to sample retention. This includes stiff penalties for unauthorized use of a sample: In California, misuse of a sample is punishable as a felony; disclosure of a sample profile for financial gain is subject to a criminal fine in an amount three times that of any financial gain or $10,000 whichever is greater, and civil fines in the amount of $5,000 for each violation up to $50,000 along with attorneys fees and costs can be imposed. Cal. Penal Code § 299.5.

computers and servers located in secure space at a criminal justice agency; access to CODIS software must be restricted to authorized criminal justice agency personnel; communications between laboratories participating in NDIS occur via a network accessible only to authorized criminal justice agencies; participating laboratories must comply with the FBI Director's Quality Assurance Standards for Forensic DNA Testing and DNA Databasing Laboratories (also requiring confidentiality of DNA records); laboratories must be accredited, and are subject to external audits every two years; and laboratories must comply with access and disclosure requirements of the Federal DNA Identification Act of 1994. 42 U.S.C. §14132(b)(3); see FBI Laboratory Services, U.S. Dep't of Justice, *Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System*, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet (last visited Dec. 26, 2012). [17] The unauthorized disclosure of DNA data in NDIS is subject to substantial criminal penalties. See 42 U.S.C. §14133; see also e.g., 155 Cong. Rec. S12904-

---

[17] States agreeing to the Participation Agreement with the FBI agree to comply with the Federal DNA Act, even if their State laws provide for more expansive access to their State DNA databases. As the FBI explains, "[t]o the extent that these access and disclosure provisions of the Federal DNA Act conflict with a state's DNA database law, the state has agreed to the provisions of the Federal DNA Act superseding the state law for purposes of NDIS participation." FBI Laboratory Services, U.S. Dep't of Justice, *Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System*, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet (last visited Dec. 26, 2012).

S12907 (daily ed. Dec. 10, 2009) (remarks of Senator Kyl noting improbability of and difficulties facing a hypothetical "rogue employee").

In light of the statutory and regulatory use and confidentiality restrictions, it would be misleading to suggest that during the chemical processing of samples the entire human genome is sequenced or read. No visualization of an entire genome occurs. Analysis of the 13 CODIS core loci involves approximately 1/16,666 of one percent (0.0006%) of a person's DNA, with tests for only non-coding DNA sites. See John M. Butler, Fundamentals of Forensic DNA Typing 6 (2010), *available at* http://www.amazon.com/Fundamentals-Forensic-Typing-John-Butler/dp/0123749999#reader_01237 49999 (search term 0.0006%). If a person stands on the earth and picks up a few pebbles on the surface, it does not mean he is "peeking" at oil trapped deep beneath the earth's surface. It would take a lot of equipment to drill down that far. State laboratories are not equipped to look into the genome, are prohibited by law from doing so, and are inspected and audited to ensure their practices are appropriately circumscribed.

2. Statutory use restrictions on DNA programs are sufficient to allay informational privacy concerns

To the extent that the Maryland Court of Appeals suggests that private information cannot safely be retained in government databases, given unknown and imagined future developments, its

reasoning has no support in law.[18] Cases specifically dealing with information privacy rebut this notion. Cf. *Nelson*, 131 S. Ct. at 746, 750, 761-63; *Whalen*, 429 U.S. at 599-600. It is clear that the Constitution allows citizens to be minimally burdened by the accumulation of private data for public safety reasons, provided use and disclosure restrictions protect the confidentiality of the collected information. In *Whalen*, this Court upheld a law permitting collection of names and addresses of persons prescribed dangerous drugs, and found statutory restrictions on disclosure sufficient to protect any privacy interests. *Whalen*, 429 U.S. at 599-600. Thus it also is plain that there is no viable constitutional privacy issue with respect to forensic identification DNA profiles collected from arrestees

---

[18] The balance of interests weighed by courts nationwide for evaluating the reasonableness of *convicted* offender DNA database programs does not change significantly when applied to the state and federal mandates for collecting DNA samples from felony arrestees. Compare *Kincade*, 379 F.3d at 842; *Johnson*, 440 F.3d at 489 (convicted offenders) with *Mitchell*, 652 F.3d at 387, 403 (arrestees); cf. *United States* v. *Thomas*, No.10-CR-6172, 2011 U.S. Dist. LEXIS 45333, at *26-*8 (W.D.N.Y. Feb. 14, 2011) (defendant's status as an indicted person "does not materially affect the analysis of the privacy right at stake"). There is a large body of federal and state case law, upholding collection of DNA database samples from convicted felony offenders. See Robin Cheryl Miller, Annotation, *Validity, Construction, and Operation of State DNA Database Statutes*, 76 A.L.R.5th 239 (2012) (collecting cases). The same confidentiality and use restrictions that protect DNA database samples collected from convicted offenders protect DNA database samples collected from arrestees. Although the timing of sample collection is different, the operational structures of the databases are the same.

pursuant to statute and stored in use-restricted, confidential databases. See *Nelson,* 131 S. Ct. at 761-63 ("the mere possibility that security measures will fail provides no 'proper ground' for a broad-based attack on government information-collection practices").

3. Speculation is not part of a Fourth Amendment analysis

To the extent the Maryland Court of Appeals suggests that DNA samples could still be used for nefarious purposes, this consideration is not constitutionally relevant. Speculation is not part of the Fourth Amendment inquiry. Cf. *Acton,* 515 U.S. at 616, 652-666 (finding it significant that lab tests looked only for drugs, not medical conditions, and that test results were disclosed only to a limited class of personnel); *United States* v. *Karo,* 468 U.S. 705, 712 (1984); see also *Wilson* v. *Collins*, 517 F.3d 421, 430 (6th Cir. 2008). Rather, presumptions, to the extent they apply, favor the reasonableness of laws adopted by the States and governed by Congressional mandates. See generally *United States* v. *Watson*, 423 U.S. 411, 416 (1976).

In *Kincade*, the defense and its amici argued that because DNA samples "conceivably could be mined for more private information or otherwise misused in the future," the possible future invasion of personal privacy outweighed the government's interests. The Ninth Circuit rejected the argument:

> [B]eyond the fact that the DNA Act itself provides protections against such misuse, our job is limited to resolving the constitutionality of the program before us, as it is designed and as it has been

> implemented. In our system of government, courts base decisions not on dramatic Hollywood fantasies, but on concretely particularized facts developed in the cauldron of the adversary process and reduced to an assessable record. If . . . some future program permits the parade of horribles the DNA Act's opponents fear . . . we have every confidence that courts will respond appropriately.

Kincade, 379 F.3d at 837-838.

Arrestee forensic identification databases should not be invalidated on the basis of speculative uses that are expressly outlawed. Instead, they should be approved for their actual uses: to accurately identify arrestees, to determine arrestees' criminal histories, to help assess arrestees' dangerousness during periods of pre-trial release, and to determine whether arrestees are responsible for unsolved crimes.

Finally, a DNA statute like Maryland's does not represent a constitutional ceiling for arrestee database programs. The fundamental question is whether use-restricted, confidential forensic identification DNA samples may be collected from arrestees consistent with the Fourth Amendment. The answer to this question is "yes," and does not depend on any particular feature of Maryland's law. "Under the totality of the circumstances, collection of DNA samples from felony arrestees is reasonable under the Fourth Amendment.

CONCLUSION

The judgment of the Maryland Court of Appeals should be reversed.

January 2, 2013

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
SUSAN DUNCAN LEE
Acting State Solicitor General
ENID A. CAMPS
Deputy Attorney General

Counsel of Record
Counsel for Amici Curiae

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-207

IN THE
Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

ALONZO JAY KING, JR.,
Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF OF COUNCIL FOR RESPONSIBLE GENETICS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

JEREMY GRUBER
COUNCIL FOR
RESPONSIBLE GENETICS
5 Upland Road, Suite 3
Cambridge, MA 02140
(617) 868-0870

MATTHEW S. HELLMAN
Counsel of Record
LEAH J. TULIN
R. TRENT MCCOTTER
RUKKU SINGLA*
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
(202) 639-6000
mhellman@jenner.com

*Admitted in Ohio only; supervised by principals of the firm

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. Permitting DNA Collection From Arrestees Will Likely Result In DNA From A Disproportionate Number Of Innocent Minorities Being Included In Forensic Databases 4

A. DNA Databases Contain A Disproportionate Number Of Profiles Of Innocent Minority Arrestees 5

B. Expungement Procedures Will Not Protect Innocent Arrestees' DNA Profiles from Remaining in the Database 14

II. Expanding The Collection Of DNA Samples To Include Mere Arrestees Will Stigmatize Innocent Minorities And Unfairly Target Them For Law Enforcement Surveillance 18

A. Databanking Of Innocent Minorities Increases Stigma And May Contribute To Racial Profiling And Wrongful Convictions. 18

B. Familial Searching Unfairly Targets Innocent Minorities for Investigation..... 26

C. The Experience In The United Kingdom Provides A Window Into The Future Of DNA Databanking In The United States..... 31

CONCLUSION 35

TABLE OF AUTHORITIES

CASES

S. & Marper v. United Kingdom, 2008 Eur. Ct. H.R. 1581 34

Sutton v. Texas, No. 14-99-00951-CR, 2001 WL 40349 (Tex. Ct. App. – Houston Jan. 18, 2001) 26

STATUTES

42 U.S.C. § 14132(d)(1) 15

42 U.S.C. § 14135a(a) 10

730 ILCS 5/5-4-3(a-3.2) 12

730 ILCS 5/5-4-3(f-1) 15

Ala. Code § 36-18-25(i) 15

Ala. Code § 36-18-25(c)(1) 10

Alaska Stat. § 44.41.035(i) 15

Alaska Stat. § 44.41.035(b)(6) 10

Ariz. Rev. Stat. Ann. § 13-610(M) 15

Cal. Penal Code § 296(a)(2) 10

Cal. Penal Code § 296.1(a)(1) 10

Cal. Pen. Code. § 299(b) 16

Cal. Penal Code § 299(c) 15

Cal. Penal Code § 299(c)(1) 16

Cal. Penal Code § 299(c)(2) 16

Cal. Penal Code § 299(c)(2)(A) 16

Cal. Penal Code § 299(c)(2)(B) 16
Cal. Penal Code § 299(c)(2)(C) 16
Cal. Penal Code § 299(c)(2)(D) 16
Cal. Penal Code § 799 16
Cal. Penal Code § 800 16
Cal. Penal Code § 801 16
Colo. Rev. Stat. Ann. § 16-23-103(1)(a) 10
Colo. Rev. Stat. Ann. § 16-23-104(2) 16
Colo. Rev. Stat. Ann. § 16-23-105(2) 16
D.C. Code § 22-4151(b) 30
Fla. Stat. Ann § 943.325(2)(g)(2)(c) 10
Fla. Stat. Ann. § 943.325(16) 15
Kan. Stat. Ann. § 21-2511(e)(2) 10
Kan. Stat. Ann. § 21-2511(e)(4) 15
La. Rev. Stat. Ann. § 15:609(A)(1) 10
La. Rev. Stat. Ann. § 15:614(B) 15
Md. Code Ann., Pub. Safety § 2-504(d)(1) 12
Md. Code Ann., Pub. Safety § 2-513(b)(3) 7
Md. Code, Pub. Safety, § 2-506(d) 30
Md. Code Regs. 29.05.01.16(B)(3) 7
Mich. Comp. Laws Ann. § 28.176(11) 15
Minn. Stat. § 299C.105(1)(a)(1) 12
Minn. Stat. § 299C.105(3) 16
N.C. Gen. Stat. § 15A-266.3A 12

N.D. Cent. Code § 31-13-03 10

N.D. Cent. Code § 31-13-07(1) 15

N.J. Rev. Stat. § 53:1-20.25(a)(1)(i) (effective Feb. 1, 2013) 15

N.M. Stat. Ann. § 29-16-6(B) 10

N.M. Stat. Ann. § 29-16-10(B)(3) 15

Ohio Rev. Code Ann. § 2901.07(B)(1) 10

Okla. Admin. Code § 375:30-9-2 16

S.C. Code Ann. § 23-3-620(A) 10

S.D. Codified Laws § 23-5A-1(8) 10

S.D. Codified Laws § 23-5A-5.2 10

S.D. Codified Laws § 23-5A-28 16

Tex. Gov't Code Ann. § 411.1471 10

Va. Code Ann. § 19.2-310.2:1 12

Vt. Stat. Ann. tit. 20, § 1933(a)(2) 10, 12

Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 5

LEGISLATIVE MATERIALS

Utilizing DNA Technology To Solve Cold Cases Act of 2011: Hearing on H.R. 3361 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 112th Cong. 31 (2012) 27-28

Utilizing DNA Technology to Solve Cold Cases Act of 2011, H.R. 3361, 112th Cong. (2011) 30

Written Statement of Anthony D. Romero, Executive Director, American Civil Liberties Union, Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary, Hearing on "Ending Racial Profiling in America" (Apr. 17, 2012), *available at* http://tinyurl.com/romeroACLU 20, 23

OTHER AUTHORITIES

Katherine Beckett et al., *Drug Use, Drug Possession Arrests and the Question of Race: Lessons from Seattle*, 52 Social Problems 419 (2005) 8

Thomas P. Bonczar, Bureau of Justice Statistics, U.S. Dep't of Justice, *Prevalence of Imprisonment in the U.S. Population, 1974-2001* (2003), *available at* http://tinyurl.com/BJSincarceration 13

Bureau of Justice Statistics, U.S. Dep't of Justice, *Arrest Data Analysis Tool, Arrests by Race and Age in the U.S., 2010*, http://tinyurl.com/BJSarrests (last visited Jan. 30, 2013) 5-6

Bureau of Justice Statistics, U.S. Dep't of Justice, *State Court Sentencing of Convicted Felons, 2004 – Statistical Tables* http://tinyurl.com/statefelonies (last visited Jan. 31, 2012) 11

Thomas H. Cohen & Tracey Kyckelhahn, Bureau of Justice Statistics, U.S. Dep't of Justice, *Felony Defendants in Large Urban Counties, 2006* (2010), http://tinyurl.com/BJScounties 6, 7, 11

Criminal Justice Act 2003, 2003 c.44, Pt. 1, § 10 34

Criminal Justice and Police Act 2001, 2001 c.16, Pt. 3, § 82 34

Crime and Security Act 2010, 2010 c.17, Pt. 14, § 2 34

Criminal Justice Statistics Center, Cal. Dep't of Justice, *Crime in California, 2005 available at* http://tinyurl.com/calcrime2005 12

Criminal Justice Statistics Center, Cal. Dep't of Justice, *Crime in California, 2006 available at* http://tinyurl.com/calcrime2006 11

Troy Duster, *DNA Dragnets and Race: Larger Social Context, History and Future* (2009), http://tinyurl.com/dnadragnet 21

Troy Duster, *Selective Arrests, an Ever-Expanding DNA Forensic Database, and the Specter of an Early-Twenty-First-Century Equivalent of Phrenology, in DNA and the Criminal Justice System* (David Lazer ed., 2004) 8, 23, 24

Troy Duster, *Social Issues Lurking in the Over-Representation of Young African American Men in the Expanding DNA Databases, in Against the Wall: Poor, Young, Black and Male* (Elijah Anderson ed., 2009) 8

Forensic Sciences Division, Maryland State Police, Statewide DNA Database Report, 2011 Annual Report (Apr. 2012) 8

Duana Fullwiley, *Can DNA "Witness" Race?: Forensic Uses of An Imperfect Ancestry Testing Technology, in Race and the Genetic Revolution: Science, Myth, and Culture* (Sheldon Krimsky & Kathleen Sloan, eds. 2011) 22

Jon Geffen & Stefanie Letze, *Chained to the Past: An Overview of Criminal Expungement Law in Minnesota*—State v. Schultz, 31 Wm. Mitchell L. Rev. 1331 (2005) 17

Maria Glod, *Charlottesville to Limit DNA Dragnet in Rape Case*, Wash. Post, Apr. 17, 2004, at B01 21

Henry T. Greely et al., *Family Ties: The Use of DNA Offender Databases to Catch Offenders' Kin*, 34 J.L. Med. & Ethics 248 (2006) 27, 28, 29

Daniel J. Grimm, *The Demographics of Genetic Surveillance: Familial DNA Testing and the Hispanic Community*, 107 Colum. L. Rev. 1164 (2007) 29

House of Commons, Home Affairs Committee, *Young Black People and the Criminal Justice System*, Second Report of Session 2006-07, Vol. 1 (May 22, 2007), *available at* http://tinyurl.com/homeaffairsrpt 33

Human Genetics Comm'n, *Nothing to Hide, Nothing to Fear?: Balancing Individual Rights and the Public Interest in the Governance and Use of the National DNA Database* (Nov. 2009), *available at* http://tinyurl.com/hgc-ndnadreport 32

Innocence Project, *Know the Cases – Josiah Sutton*, http://tinyurl.com/sutton-innocence (last visited Jan. 21, 2013) 26

Justice Policy Institute, Policy Report, *The Vortex: The Concentrated Racial Impact of Drug Imprisonment and the Characteristics of Punitive Counties* (Dec. 2007), *available at* http://tinyurl.com/justicepolicyreport 8

D.H. Kaye & Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage*, 2003 Wis. L. Rev. 413 29-30

Manfred Kayser & Peter M. Schneider, *DNA-Based Prediction of Human Externally Visible Characteristics in Forensics: Motivations, Scientific Challenges, and Ethical Considerations*, 3 Forensic Sci. Int'l: Genetics 154 (2009)..... 22

Aarti Kohli et al., The Chief Justice Earl Warren Institute on Law and Social Policy, Research Report, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process* (Oct. 2011), *available at* http://tinyurl.com/KohliSComm 20

Sheldon Krimsky & Tania Simoncelli, *Genetic Justice: DNA Data Banks, Criminal Investigations, and Civil Liberties* (2011) (paper originally presented at the Forum on Racial Justice Impacts of Forensic DNA Databanks, New York University, June 19, 2008, *available at* http://tinyurl.com/levinedrugarrest)) ..... *passim*

Laboratory Services, FBI, *Familial Searching*, http://tinyurl.com/fbi-familialsearching (last visited Jan. 10, 2013) 30

Legal Action Center, *After Prison: Roadblocks to Reentry* (2004) 19

Harry G. Levine & Deborah Peterson Small, N.Y. Civil Liberties Union, *Marijuana Arrest Crusade: Racial Bias and Police Policy in New York City 1997 – 2007* (2008), *available at* http://tinyurl.com/NYCLUreport 9

Adam Liptak, Review of DNA Clears Man Convicted of Rape, N.Y. Times, Mar. 11, 2003, at A18, *available at* http://tinyurl.com/liptak-sutton 26

Maryland Office of the Public Defender, Position on Proposed Legislation—SB 211 (Feb. 13, 2008) (on file with author) 7

Mark Motivans, Bureau of Justice Statistics, U.S. Dep't of Justice, *Federal Justice Statistics, 2009* (2011), *available at* http://tinyurl.com/BJSfedstats2009..... 10-11

Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 Cal. L. Rev. 721 (2007) 24, 25

Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 Mich. L. Rev. 291 (2010) 27, 28, 29

National Policing Improvement Agency, Statistics, NDNAD Breakdown, http://tinyurl.com/ndnadtotal..... 32

National Police Records (Recordable Offences) Regulations, 2000, S.I. 2000/1139 (U.K.) 32

National Police Records (Recordable Offences) (Amendment) Regulations, 2012, S.I. 2012/1713 (Eng. & Wales) 32

National Police Records (Recordable Offences) (Amendment) Regulations, 2007, S.I. 2007/2121 (Eng. & Wales) 32

Nuffield Council on Bioethics, *The Forensic Use of Bioinformation: Ethical Issues* (2007)..... 33

Melba Newsome, *The Inconvenient Science of Racial DNA Profiling*, Wired, Oct. 5, 2007, http://tinyurl.com/newsome profiling 21

Office for Nat'l Statistics, Statistical Bulletin, *2011 Census: Population Estimates for the United Kingdom*, 27 March 2011 (Dec. 2012), http://tinyurl.com/UKtotalpop 32

Pilar N. Ossorio, *About Face: Forensic Genetic Testing for Race and Visible Traits*, 34 J.L. Med. & Ethics 277 (2006) 22

Pilar Ossorio & Troy Duster, *Race and Genetics*, 60 Am. Psychologist 115 (2005) 22, 23

Protection of Freedoms Act 2012, 2012 c.9, Pt. 1, ch. 1 34

Natalie Ram, *Fortuity and Forensic Familial Identification*, 63 Stan. L. Rev. 751 (2011) 21-22, 28, 30

Michael T. Risher, *Racial Disparities in Databanking of DNA Profiles, in* Race and the Genetic Revolution: Science, Myth, and Culture (Sheldon Krimsky & Kathleen Sloan, eds. 2011) 17, 19, 22, 24

Jeffrey Rosen, *Genetic Surveillance For All*, Slate (Mar. 17, 2009, 4:52 PM), http://tinyurl.com/rosen-surveillance (last visited Jan. 10, 2013) 30

Julie Samuels et al., *Collecting DNA From Arrestees: Implementation Lessons*, 270 Nat'l Inst. Just. J. 18 (2012) 14, 17

Vincent Schiraldi & Jason Ziedenberg, Justice Policy Institute, *Race and Incarceration in Maryland* (2003) 9-10

Amy L. Solomon, *In Search of a Job: Criminal Records as Barriers to Employment*, 270 Nat'l Inst. Just. J. 42 (2012) 19

Sonia M. Suter, *All in the Family: Privacy and DNA Familial Searching*, 23 Harv. J.L. & Tech. 309 (2010) 18-19, 28

William C. Thompson, *The Myth of Infallibility, in Genetic Explanations: Sense and Nonsense* (Sheldon Krimsky & Jeremy Gruber eds., forthcoming Feb. 2013) 24, 25

U.S. Census Bureau, 2006 American Community Survey, ACS Demographic and Housing Estimates: 2006, http://factfinder2.census.gov/bkmk/table/1.0/en/ACS/10_SF4/B01001//popgroup~005 (last visited Jan. 30, 2013) 6, 7

U.S. Census Bureau, 2006-2010 American Community Survey Selected Population Tables: Sex by Age, http://factfinder2.census.gov/bkmk/table/1.0/en/ACS/10_SF4/B01001//popgroup~005 (last visited Jan. 30, 2013) 6

U.S. Census Bureau, 2010 American Community Survey 1-Year Estimates: Sex by Age, http://factfinder2.census.gov/bkmk/table/1.0/en/ACS/10_1YR/B01001 (last visited Jan. 30, 2013). 6

U.S. Census Bureau, 2011 American Community Survey, ACS Demographic and Housing Estimates, http://tinyurl.com/ACSMDstatedemographics 8

U.S. Equal Employment Opportunity Comm'n, EEOC Enforcement Guidance No. 915.002, *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (Apr. 25, 2012), http://tinyurl.com/eeocguidance 19

Jackie Valley, *Metro Reviewing DNA Cases After Error Led to Wrongful Conviction*, Las Vegas Sun, July 7, 2011, http://tinyurl.com/valley-jackson 25

INTEREST OF *AMICUS CURIAE*

The Council for Responsible Genetics ("CRG") is a member-supported, independent 501(c)(3) organization that was founded in 1983 to examine the social, ethical, and environmental impacts of applied genetics. Working through the media and concerned citizens, CRG distributes accurate information and commentary and represents the public interest on emerging issues in biotechnology.

Among the first projects undertaken by CRG was the publication of *GeneWatch* magazine. From its inception, *GeneWatch* has filled the critical role of analyzing the rush of information and opinions resulting from the rapid growth in genetic research and technology. Applications of forensic DNA and the growth in forensic DNA databases have been core issues for CRG, and have led to *GeneWatch* dedicating several issues to forensic DNA. CRG is a founder of the Forensic Genetics Policy Initiative, an international collaboration of non-governmental organizations dedicated to building global civil society's capacities to (1) engage in policy-making processes related to the development of national and international DNA databases and cross-border sharing of forensic information, and (2) protect privacy and human rights by setting international standards for DNA databases. CRG is a recognized

---

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

expert organization on forensic uses of DNA and has been active in local, national, and international debates on the use of such technologies for 30 years. In addition, CRG has sponsored national conferences on forensic DNA and its staff and Board have authored numerous books and articles on the subject, including the seminal book *Genetic Justice* co-authored by CRG Board Chair Professor Sheldon Krimsky, whose assistance was instrumental in the preparation of this brief, and former Board member Tania Simoncelli.

SUMMARY OF THE ARGUMENT

Maryland's DNA Collection Act is representative of a growing trend in which government collects DNA samples not just from those convicted of crimes, but from those who are merely arrested. Because only a fraction of those who are arrested are ultimately charged and convicted, however, this practice necessarily will permit the government to collect DNA from innocent people.

That the government would obtain DNA from any innocent person is disturbing, but the practice visits a special and severe harm upon minorities. Members of minority groups are arrested in disproportionate numbers, and a disproportionate percentage of innocent arrestees are therefore likely to be minorities. This brief seeks to bring to the Court's attention the wealth of social science evidence documenting the harms to minorities from this practice. In particular, innocent minority arrestees (and increasingly their blood relatives) are

especially likely to experience stigmatization and unwarranted law enforcement surveillance from being included in the DNA database.

First, it is indisputable that collecting DNA from arrestees likely will lead to a disproportionate impact on minorities. In general, minorities – especially young black men – are arrested at much higher rates than their white counterparts. Those disparities are particularly dramatic for certain offenses, like drug crimes, and they cannot be explained by looking at the rates of criminal activity between racial groups. Meanwhile, conviction rates are variable and often quite low, resulting in tens of thousands of people each year being arrested for – but not convicted of – a crime. Because of the disproportionality in arrest rates, those innocent arrestees who are subjected to DNA collection each year without a finding of guilt are likely to be disproportionately black or Hispanic. And a substantial number of those innocent arrestees will not have the knowledge, resources, or determination required to successfully navigate the onerous expungement procedures that most jurisdictions have implemented.

As a result, many DNA profiles of innocent minorities will be continually searched as part of law enforcement investigations that could include cold hit searches, familial searches, and DNA-based racial profiling. That heightened scrutiny by law enforcement not only will contribute to the further stigmatization of minorities in American society, but may also lead to false positive DNA matches, which in turn will subject innocent minorities to a greater risk of false incriminations and convictions. Those

troubling consequences can be mitigated by keeping innocent arrestees out of DNA databanks, a lesson that the United Kingdom finally has begun to learn after public resistance to and judicial scrutiny of broad, racially imbalanced DNA collection and retention policies.

ARGUMENT

I. Permitting DNA Collection From Arrestees Will Likely Result In DNA From A Disproportionate Number Of Innocent Minorities Being Included In Forensic Databases.

Maryland's DNA statute is part of an increasing trend in which jurisdictions collect DNA samples not just from those who are convicted of crimes, but from those who are merely arrested. These arrestee DNA statutes are likely to result in the collection of DNA from a greater proportion of innocent minorities in relation to their population. This is because minorities are arrested in disproportionate numbers, and thus make up a correspondingly disproportionate share of those who are ultimately not convicted. And contrary to the suggestion of Petitioner's *amici*, expungement provisions will not prevent this problem because they typically erect procedural hurdles that minorities, in particular, may not have the resources to overcome. The possibility of expungement also fails to erase the harms that DNA collection may cause prior to expungement, which also are likely to disproportionately impact minorities.

A. DNA Databases Contain A Disproportionate Number Of Profiles Of Innocent Minority Arrestees.

Since 2004, Congress has permitted arrestee DNA profiles to be uploaded to CODIS. *See* Justice for All Act of 2004, Pub. L. No. 108-405, § 203, 118 Stat. 2260. Today, some 28 states, including Maryland, and the federal government upload arrestee profiles for at least some offenses. And the number of arrestee profiles in CODIS has expanded from just 50,000 in 2006, to more than 1.1 million in 2012.

Two empirical consequences of the expansion of CODIS to arrestees are that (1) minorities make up a disproportionate share of the profiles because they are arrested at a higher frequency than whites for the same crimes, and (2) minorities make up a correspondingly disproportionate share of arrests that do not lead to a conviction. Thus, as we explain, jurisdictions that collect DNA from arrestees will end up collecting DNA from substantial numbers of minorities who are ultimately not convicted of a crime.

Arrest Rates. The higher rates of arrests for minorities are a well-documented and disturbing trend. For example, according to the Bureau of Justice Statistics, in 2010 blacks accounted for approximately 27% of adult arrests in the United States at a time when the adult black population was only 12% of the total adult population in the United States. *Compare* Bureau of Justice Statistics, U.S. Dep't of Justice, *Arrest Data Analysis Tool, Arrests*

by Race and Age in the U.S., 2010. http://tinyurl.com/BJSarrests (last visited Jan. 31, 2013) (select "National Estimates"; then select "Annual Tables"; then select "2010" and "Offense By Age and Race") (3.1 million black arrests out of 11.5 million total arrests), *with* U.S. Census Bureau, 2006-2010 American Community Survey Selected Population Tables: Sex by Age[2] (28.2 million African American adults) *and* U.S. Census Bureau, 2010 American Community Survey 1-Year Estimates: Sex by Age[3] (235.2 million total adults).

Data collected by the federal government about felony defendants suggests that racial disparities are particularly dramatic in certain counties.[4] For instance, in 2006, blacks made up 52% of the population of Shelby County, Tennessee, yet constituted a full 85% of felony defendants. *Compare* U.S. Census Bureau, 2006 American Community Survey, ACS Demographic and Housing Estimates: 2006, http://tinyurl.com/shelbycountydemographics, *with* Thomas H. Cohen & Tracey Kyckelhahn, Bureau of Justice Statistics, U.S. Dep't of Justice, *Felony Defendants in Large Urban Counties, 2006*, at 36 app. tbl. 18 (2010), http://tinyurl.com/BJScounties. Similarly, in Los Angeles County, California, the black population was approximately

---

[2] *See* http://factfinder2.census.gov/bkmk/table/1.0/en/ACS/10_SF4/B01001//popgroup~005 (last visited Jan. 30, 2013).

[3] *See* http://factfinder2.census.gov/bkmk/table/1.0/en/ACS/10_1YR/B01001 (last visited Jan. 30, 2013).

[4] As explained further below, significant numbers of those arrested are never charged with or prosecuted for a crime, so the number of arrestees is actually substantially higher than the number of defendants. *See infra* pp. 10-13.

9.5%, while blacks made up 34% of the felony defendants. *Compare* U.S. Census Bureau, 2006 American Community Survey, ACS Demographic and Housing Estimates: 2006, http://tinyurl.com/lacountydemographics, *with* Cohen & Kyckelhahn, *supra*, at 36 app. tbl. 18. And in that same year, the Hispanic population of Maricopa County, Arizona was 30%, while Hispanics made up 39% of the felony defendant population. *Compare* U.S. Census Bureau, 2006 American Community Survey, ACS Demographic and Housing Estimates: 2006, http://tinyurl.com/maricopademographics, *with* Cohen & Kyckelhahn, *supra*, at 36 app. tbl. 18.

Maryland has proven no exception to this trend. In the three years since Maryland has begun collecting data about racial demographics of arrestees alongside DNA samples, blacks have consistently been approximately 60% of the total number of individuals arrested and charged with qualifying offenses, despite being only approximately 30% of the total population in the state of Maryland.[5]

---

[5] Indeed, the Maryland legislature was not only aware of concerns about disproportionate arrest rates when it considered expanding DNA collection to include arrestees, but actually amended the statute to require reporting of racial demographics in connection with DNA collection. *See, e.g.*, Md. Code Ann., Pub. Safety § 2-513(b)(3); Md. Code Regs. 29.05.01.16(B)(3); Maryland Office of the Public Defender. Position on Proposed Legislation – SB 211 (Feb. 13, 2008) (on file with author) (stating that "since nonwhites are arrested at nearly three times the rate of whites, the resulting DNA database will perpetuate flaws that exist in the arrest practices of police departments"). As the statistics above demonstrate, those concerns were warranted.

Compare Forensic Sciences Division, Maryland State Police, Statewide DNA Database Report, 2011 Annual Report 7 (Apr. 2012), *with* U.S. Census Bureau, 2011 American Community Survey, ACS Demographic and Housing Estimates, http://tinyurl.com/ACSMDstatedemographics. In contrast, whites made up approximately 36% of arrested and charged individuals, while constituting 61% of the total population. *See id.*

Some crimes, most notably drug offenses, have particularly disproportionate minority arrest rates. *See, e.g.*, Troy Duster, *Social Issues Lurking in the Over-Representation of Young African American Men in the Expanding DNA Databases, in Against the Wall: Poor, Young, Black and Male* 182-83 & figs. 12.1, 12.2 (Elijah Anderson ed., 2008); Troy Duster, *Selective Arrests, an Ever-Expanding DNA Forensic Database, and the Specter of an Early-Twenty-First-Century Equivalent of Phrenology, in DNA and the Criminal Justice System* 315, 320 (David Lazer ed., 2004) ("*Selective Arrests*"). For example, one study found that "drug use data indicate that between 36 and 69 percent of those who use or abuse crack cocaine in Seattle are white, yet only 26.3 percent of those arrested for crack possession are white." Katherine Beckett et al., *Drug Use, Drug Possession Arrests and the Question of Race: Lessons from Seattle*, 52 Social Problems 419, 426-27 (2005); *cf.* Justice Policy Institute, Policy Report, *The Vortex: The Concentrated Racial Impact of Drug Imprisonment and the Characteristics of Punitive Counties* 7 (Dec. 2007), *available at* http://tinyurl.com/justicepolicyreport ("[I]n 2002, 24

percent of crack cocaine users were African American and 72 percent were white or Hispanic, yet more than 80 percent of defendants sentenced for crack cocaine offenses were African American."). Similarly, even though studies show white people use marijuana at a higher rate than blacks and Hispanics, marijuana possession arrests for black people are as much as eight times the arrest rate for white people, and the arrest rate of Hispanics is nearly three times that of whites. *See* Sheldon Krimsky & Tania Simoncelli, *Genetic Justice: DNA Data Banks, Criminal Investigations, and Civil Liberties* 254 (2011) (citing Harry G. Levine, et al., *Drug Arrests and DNA: Building Jim Crow's Database* (July 2008), *available at* http://tinyurl.com/levinedrugarrest (paper originally presented at the Forum on Racial Justice Impacts of Forensic DNA Databanks, New York University, June 19, 2008)); Harry G. Levine & Deborah Peterson Small, N.Y. Civil Liberties Union, *Marijuana Arrest Crusade: Racial Bias and Police Policy in New York City 1997 – 2007*, at 4, 14 (2008), *available at* http://tinyurl.com/NYCLUreport.

As with overall arrest rates, Maryland's drug arrest rates mirror national data. A 2003 study commissioned by Maryland's Legislative Black Caucus, for example, showed that while African Americans made up 28% of the population in Maryland, they represented 68% of those arrested for drug offenses and 90% of those incarcerated for those offenses. Vincent Schiraldi & Jason Ziedenberg,

Justice Policy Institute, *Race and Incarceration in Maryland* 12 (2003).

The issue of the extent to which these disproportionate arrest rates reflect discriminatory police tactics is a subject that cannot be fully treated in this brief. But what is clear is that as states broaden their DNA statutes to include more qualifying offenses, it likely will increase the disproportionate number of minorities already in DNA databases.[6]

Non-Conviction Rates. Many of those arrested, however, are never convicted, and because minorities are arrested at a higher rate, they also make up a disproportionately high percentage of those ultimately not convicted.

In 2009, the overall conviction rate for federal offenses averaged only 47%. *See* Mark Motivans, Bureau of Justice Statistics, U.S. Dep't of Justice,

---

[6] Of the 28 states (plus the federal government) that collect DNA from arrestees, more than half already include *all* felonies in the list of qualifying offenses. *See* 42 U.S.C. § 14135a(a) (any felony); Ala. Code § 36-18-25(c)(1) (any felony or sexual offense); Alaska Stat. § 44.41.035(b)(6) (any felony or crime against a person); Cal. Penal Code §§ 296(a)(2), 296.1(a)(1) (any felony); Colo. Rev. Stat. Ann. § 16-23-103(1)(a) (any felony); Fla. Stat. Ann. § 943.325(2)(g)(2)(c) (any felony); Kan. Stat. Ann. § 21-2511(e)(2) (any felony); La. Rev. Stat. Ann. § 15:609(A)(1) (any felony); N.M. Stat. Ann. § 29-16-6(B) (any felony); N.D. Cent. Code § 31-13-03 (any felony); Ohio Rev. Code Ann. § 2901.07(B)(1) (any felony); S.D. Codified Laws §§ 23-5A-1(8), 23-5A-5.2 (any felony, crime of violence, or any sex offense); S.C. Code Ann. § 23-3-620(A) (any felony); Tex. Gov't Code Ann. § 411.1471 (any felony); Vt. Stat. Ann. tit. 20, § 1933(a)(2) (any felony).

Federal Justice Statistics, 2009, at 2 & tbl. 7 (2011), *available at* http://tinyurl.com/BJSfedstats2009 (183,986 arrests for federal offenses, but only 86,975 convictions in federal court). The picture is not much better when looking at state conviction rates. Although data collected by the Justice Department indicates that overall conviction rates for felony defendants in large urban counties have remained around 68% for the last several years, *see* Cohen & Kyckelhahn, *supra*, at 2, some offenses have a conviction rate as low as 16% (motor vehicle theft), 25% (aggravated assault), 44% (burglary), and 46% (robbery). *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *State Court Sentencing of Convicted Felons, 2004 – Statistical Tables* tbl. 1.8, http://tinyurl.com/statefelonies (last visited Jan. 31, 2012); *King v. State*, 42 A.3d 549, 577-78 & n.32 (Md. Ct. App. 2012) (citing statistics).

Even at the highest rates of conviction, acquittal and dismissal of charges account for approximately 25% of the cases against felony defendants – meaning that almost a quarter of all felony defendants (and more, for some offenses) are released from the criminal justice system without a finding of guilt. *See, e.g.*, Cohen & Kyckelhahn, *supra*, at 11 tbl. 11; Criminal Justice Statistics Center, Cal. Dep't of Justice, *Crime in California, 2006*, at 50 tbl. 39 *available at* http://tinyurl.com/calcrime2006 (from 2001-2006, adult felony conviction rates in the state were approximately 69%, release, 3%; denied complaints, 13%; and dismissals or acquittals, 14%).

Moreover, a significant number of arrestees are released without ever being charged with any offense. In California, for instance, the number of individuals who were released without charges or complaints submitted ranged from 2.9% to 4.1% of the individuals arrested – between 7,698 and 11,248 individuals each year. *See* Criminal Justice Statistics Center, Cal. Dep't of Justice, *Crime in California, 2005*, at 148 tbl. 39, *available at* http://tinyurl.com/calcrime2005. The majority of states that collect DNA samples from arrestees do so at the time a suspect is booked and processed, guaranteeing that innocent people will have their DNA profiles included in DNA databases.[7] But given acquittal and dismissal-of-charges rates, even states (such as Maryland) that collect DNA samples only after a charging decision is made undoubtedly capture innocent arrestees in their nets.

In sum, non-conviction rates mean that a substantial number of individuals, including a disproportionate number of minorities, will have their DNA collected upon arrest even though they are not convicted for that crime. Imagine that a state has just introduced the collection of arrestee

---

[7] In just a few states does the analysis of the sample and placement of a profile in the database occur after probable cause has been determined or the defendant is arraigned. *See* 730 ILCS 5/5-4-3(a-3.2) (after indictment or probable cause hearing); Md. Code Ann., Pub. Safety § 2-504(d)(1) (after arraignment); Minn. Stat. § 299C.105(1)(a)(1) (after probable cause determination); Va. Code Ann. § 19.2-310.2:1 (after probable cause determination); Vt. Stat. Ann. tit. 20, § 1933(a)(2) (after arraignment); *see also* N.C. Gen. Stat. § 15A-266.3A (probable cause hearing required if no arrest warrant).

DNA and has 100,000 arrestees in its first year. Assuming a 30% overall non-conviction rate (a conservative estimate based on the data above), the database will contain 30,000 non-offenders, of whom almost 8,400 will be black.[8] If the racial makeup of arrestees remains constant over time, then over a period of years innocent blacks will represent 28% of the non-offender profiles in the database despite constituting only 12% of the overall population.

This disproportionate effect on innocent minorities is borne out by other studies. The Bureau of Justice Statistics predicts that 32% of black males born in 2001 will be incarcerated at some point in their lives. *See* Thomas P. Bonczar, Bureau of Justice Statistics, U.S. Dep't of Justice, *Prevalence of Imprisonment in the U.S. Population, 1974-2001*, at 1 (2003), *available at* http://tinyurl.com/BJSincarceration. Assuming the same non-conviction rate of 30%, there will be 1 non-conviction of a black male for every 2.3 convictions. This suggests that in addition to the 32% of black males who will be convicted and incarcerated at some point in their lives, approximately 14% additional black males born that same year will be arrested but never convicted.[9] When those arrests are for qualifying

---

[8] This assumes that black arrestees are just as likely to be convicted as white arrestees. Of course, if black arrestees are less likely to ultimately be convicted, the database would contain even more profiles from innocent blacks.

[9] Although these estimates may include some people who are incarcerated for one crime but had a previous non-conviction arrest for a separate crime, a conservative non-conviction rate counterbalances such an effect by underestimating the number of innocent arrestees overall.

offenses, the government will end up collecting DNA from a sizeable portion of a minority group that has never been convicted of any crime.

B. Expungement Procedures Will Not Protect Innocent Arrestees' DNA Profiles from Remaining in the Database.

In the face of these substantial non-conviction rates, and their disproportionate effect on minorities, an amicus brief submitted by a group of state governors urges the Court to allow the collection of DNA data from mere arrestees because they claim that data will be expunged from the database if the arrestee is not ultimately convicted. *See* Br. of the Nat'l Governors' Assoc. at 17-18; *see also* Br. of Susana Martinez at 19-20. But the possibility of eventual expungement does not eliminate the prospect of innocent arrestees being included in the database. And as with other aspects of the criminal justice system in general and the collection of DNA in particular, minorities are likely to bear a disproportionate weight of that defect.

First, even in states where an arrestee's DNA information is automatically expunged if the arrestee is not ultimately convicted of a crime, it can take months or years until the DNA profile is destroyed. *Cf.* Julie Samuels et al., *Collecting DNA From Arrestees: Implementation Lessons*, 270 Nat'l Inst. Just. J. 18, 23 (2012) (noting that "[s]tate-initiated expungement processes require a great deal of coordination between the laboratory and the agency responsible for initiating the expungement process"). In the interim, innocent arrestees may suffer the

consequences associated with having their DNA profile in a forensic database, including – but not limited to – being falsely incriminated of a crime or subjected to familial searches. *See generally infra* Parts II.A&B (discussing harms of commingling DNA profiles of innocent arrestees and convicted felons).

Moreover, expungement processes in many states are not self-executing. Instead, they place the onus of removing a DNA profile from the database on the innocent arrestee himself. Of the 29 jurisdictions that collect DNA upon arrest or indictment, 17 require the arrestee to file a request with a state law enforcement agency or court, and those jurisdictions almost always require the arrestee to provide supporting certified documents showing that no charges were brought, the charges were dismissed, or the petitioner was found not guilty.[10] Another two

---

[10] *See* 42 U.S.C. § 14132(d)(1) (request to FBI, filed with supporting court documentation); Ala. Code § 36-18-25(i) (only by court order); Alaska Stat. § 44.41.035(i) (written request, filed with supporting court order); Ariz. Rev. Stat. Ann. § 13-610(M) (petition the court); Cal. Penal Code § 299(c) (written request, with supporting court documentation); Fla. Stat. Ann. § 943.325(16) (request to Department of Law Enforcement, with supporting court documentation); 730 ILCS 5/5-4-3(f-1) (request to Department of State Police, with supporting court documentation); Kan. Stat. Ann. § 21-2511(e)(4) (request to Kansas Bureau of Investigation); La. Rev. Stat. Ann. 15:614(B) (request to state police, with supporting court order); Mich. Comp. Laws Ann. § 28.176(11) (request to state police, with supporting court documentation); N.J. Rev. Stat. § 53:1-20.25(a)(1)(i) (effective Feb. 1, 2013) (petition the court); N.M. Stat. Ann. § 29-16-10(B)(3) (request to administrative center, with supporting court documents); N.D. Cent. Code § 31-13-

jurisdictions automatically remove profiles only in limited scenarios, and otherwise require the arrestee to send a request to a government agency.[11] All of these procedures involve substantial delay and impose both actual costs and administrative burdens on the innocent arrestee seeking expungement.[12]

These procedural hurdles pose a barrier to all innocent arrestees, but innocent minority arrestees may be especially unwilling or unable to expend the resources necessary to achieve the expungement of their DNA from the database. "[F]ew arrestees, no matter how innocent, will be likely ever to return to

---

07(1) (petition the court); Okla. Admin. Code § 375:30-9-2 (petition the court); S.D. Codified Laws § 23-5A-28 (request to state agency).

[11] *See* Colo. Rev. Stat. Ann. §§ 16-23-104(2), -105(2) (automatic only if no felony is charged within a year; otherwise must send request to Colorado Bureau of Investigation); Minn. Stat. § 299C.105(3) (automatic only if defendant found not guilty of a felony; otherwise must send request to Bureau of Criminal Apprehension).

[12] For example, in California the arrestee must wait until he either has been pardoned or acquitted, his case has been dismissed, or the statute of limitations has expired, which for felonies is a minimum of three years. Cal. Pen. Code. § 299(b); §§ 799-801. The innocent arrestee must then send an expungement request to numerous parties, *id.* § 299(c)(1), and then wait at least six months to give the state an opportunity to object. *Id.* § 299(c)(2)(D). After filing still more documentation, *id.* § 299(c)(2)(A)-(D), the court has discretion to deny the petition, in which case the petitioner has no recourse – the decision is a "nonappealable order and shall not be reviewed by petition for writ." *Id.* § 299(c)(1). And even if the innocent arrestee prevails, he must submit the court order to the California Department of Justice and wait for it to destroy the DNA sample and profile. *Id.* § 299(c)(2).

court to wade through the process of getting their samples and profiles removed. This is particularly true for those without the resources to hire a lawyer to assist them." Michael T. Risher, *Racial Disparities in Databanking of DNA Profiles, in Race and the Genetic Revolution: Science, Myth, and Culture* 51 (Sheldon Krimsky & Kathleen Sloan, eds. 2011); Jon Geffen & Stefanie Letze, *Chained to the Past: An Overview of Criminal Expungement Law in Minnesota*—State v. Schultz, 31 Wm. Mitchell L. Rev. 1331, 1338-39 (2005) (low income individuals less likely to seek expungement of criminal records because they lack resources to hire counsel); *see also* Samuels et al., *supra*, at 23 ("[O]ur interviews with state crime laboratories suggest that when individuals bear the burden of initiating the expungement process, very few expungements actually occur and profiles are retained of individuals who were never formally charged with a qualifying offense or whose case resulted in acquittal or dismissal."). Indeed, imposing procedural hurdles to expungement makes it unlikely that a person of limited resources, or someone distrusting of law enforcement, will pursue the expungement of his DNA from the database. And the result will be that minorities, who will make up a disproportionate number of those arrested but not convicted, will also make up a disproportionate number of those innocent arrestees whose DNA material is never expunged from the database.

II. Expanding The Collection Of DNA Samples To Include Mere Arrestees Will Stigmatize Innocent Minorities And Unfairly Target Them For Law Enforcement Surveillance.

It is disturbing that any innocent person's DNA would appear in a database purportedly consisting of DNA from convicted criminals. But the consequences are particularly severe for innocent minorities. Because they are likely to be disproportionately represented in the database, and because of pre-existing disparities associated with minorities and law enforcement, innocent minorities will likely be especially subject to stigmatization and unwarranted law enforcement surveillance as a result of their inclusion in the database. Moreover, to the extent that familial searches are permitted from collected DNA (as they increasingly are), these consequences will spread beyond innocent arrestees to their families, and familial searches will manifest similar racial and ethnic disparities.

A. Databanking Of Innocent Minorities Increases Stigma And May Contribute To Racial Profiling And Wrongful Convictions.

Being included in a DNA database of convicted criminals is likely to perpetuate the stigma that innocent minorities already experience from having been disproportionately arrested and singled out for law enforcement scrutiny. Because of preexisting stereotypes about race and criminality, innocent minorities are especially likely to be labeled a criminal simply because their DNA profiles have been catalogued. *See* Sonia M. Suter, *All in the*

Family: Privacy and DNA Familial Searching, 23 Harv. J.L. & Tech. 309, 371 (2010) (disproportionate investigations of minorities reinforce stereotypes about criminality and race).[13]

The stigmatization of innocent minorities may also lead to concrete, negative law enforcement consequences. For example, law enforcement officials may be biased against someone whose DNA is in the database on the theory that prior interaction with law enforcement makes it more likely that the person is guilty of a crime. Police officers increasingly have access to DNA profiles while on patrol, which may lead officers to subject a person of color to questioning for no other reason than that his profile appears in the database.[14]

---

[13] These effects may not be limited to the sphere of criminal justice. If DNA records become available more broadly, as forms of arrest records are, minorities may face discrimination in contexts such as employment, occupational licensing, and public housing. *See* Legal Action Center, *After Prison: Roadblocks to Reentry* 10, 16 (2004); *see also, e.g.*, Amy L. Solomon, *In Search of a Job: Criminal Records as Barriers to Employment*, 270 Nat'l Inst. Just. J. 42, 43-44 (2012) (discussing disparate impact of arrest-based employment decisions on people of color); U.S. Equal Employment Opportunity Comm'n, EEOC Enforcement Guidance No. 915.002, *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (Apr. 25, 2012), http://tinyurl.com/eeocguidance (permitting an employer to make an employment decision "based on the conduct underlying an arrest if the conduct makes the individual unfit for the position in question").

[14] Indeed, preexisting stigma or prejudice against minorities may even lead individual officers to make "questionable or outright illegal arrests" in the hopes of collecting a DNA sample. Risher, *supra*, at 59.

Krimsky & Simoncelli, *supra*, at 264 (describing the use of portable devices that allow police officers to upload DNA samples and provide remote access to DNA profiles). Given the well-documented profiling and targeting of Latinos due to concerns about illegal immigration, permitting the collection of DNA from innocent arrestees is likely to have an increasingly disproportionate impact on Latino communities. *See generally* Written Statement of Anthony D. Romero, Executive Director, American Civil Liberties Union, Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary, Hearing on "Ending Racial Profiling in America" 9-18 (Apr. 17, 2012) ("*Romero Racial Profiling Testimony*"), *available at* http://tinyurl.com/romeroACLU (discussing profiling and pretextual arrests of Latinos as part of federal and state immigration initiatives); Aarti Kohli et al., The Chief Justice Earl Warren Institute on Law and Social Policy, Research Report, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process* (Oct. 2011), *available at* http://tinyurl.com/KohliSComm (finding that federal immigration policy disproportionately targets Latinos and leads to arrest of hundreds of U.S. citizens).

Indeed, DNA identification has already been used to identify suspects in ways that are reminiscent of more traditional forms of racial profiling. Perhaps the best example of that phenomenon is racially targeted DNA dragnets, where law enforcement officials have solicited, collected, and stored DNA samples from large numbers of innocent people of color to hone in on minority suspects. *See, e.g.*, Troy

Duster, *DNA Dragnets and Race: Larger Social Context, History and Future* 15-16 (2009), http://tinyurl.com/dnadragnet (originally presented at CRG's conference, Forensic DNA Databases and Race: Issues, Abuses and Actions, held June 19, 2008 at New York University). Thus, in the early 1990s, police in San Diego collected DNA samples from 750 African American men as part of a search for a serial killer who had been identified as African American. *Id.* at 16. A similar dragnet in Charlottesville, Virginia was temporarily suspended and then strictly limited after police drew heavy criticism for collecting DNA samples from almost 200 men of color as part of an investigation of a serial rapist. *See* Maria Glod, *Charlottesville to Limit DNA Dragnet in Rape Case*, Wash. Post, Apr. 17, 2004, at B01 (reporting that police limited scope of dragnet based on accusations of racial profiling). Likewise, the existence of DNA databases maintained by local jurisdictions – many of which contain more information than CODIS and are not limited to offender samples – serves to magnify the concern about profiling and police abuse.[15] *See* Natalie Ram,

---

[15] The use of ancestry testing of crime scene DNA to make broad stroke predictions of a perpetrator's race based on genetic phenotyping threatens to introduce yet another form of DNA-based racial profiling. *See* Melba Newsome, *The Inconvenient Science of Racial DNA Profiling*, Wired, Oct. 5, 2007, http://tinyurl.com/newsomeprofiling (reporting that DNAWitness, a DNA testing program used to provide ancestry testing services to law enforcement, "has been used in more than 150 criminal cases all across the country and in London"). The basic assumption behind ancestry testing is that there are differences in the relative frequencies of DNA patterns in the inhabitants of four geographical regions of the world: Africa,

Fortuity and Forensic Familial Identification, 63 Stan. L. Rev. 751, 762 (2011) (noting that it is unclear how local law enforcement use such databases, but that some include profiles of excluded suspects).

In addition to stigmatizing innocent minorities and contributing to increased racial profiling, DNA databases that contain the profiles of innocent minorities are also likely to contribute to unfair and inequitable results in criminal investigations and prosecutions. First, using a racially skewed database that includes innocent people to identify suspects will create an undeniable discriminatory "feedback loop" for minorities. Risher, *supra*, at 54; Krimsky & Simoncelli, *supra*, at 262-63. The

---

Asia, Europe and Pre-Columbian America. By locating the source of the crime scene DNA to one of the four main population groups, ancestry testing companies claim, with some level of confidence, that the source of the DNA was a person from one of those regions of the world. That type of profiling is of particular concern because it is a limited, potentially prejudicial science that was developed for population studies and not for individual identification. *See* Duana Fullwiley, *Can DNA "Witness" Race?: Forensic Uses of An Imperfect Ancestry Testing Technology, in Race and the Genetic Revolution*, *supra*; Manfred Kayser & Peter M. Schneider, *DNA-Based Prediction of Human Externally Visible Characteristics in Forensics: Motivations, Scientific Challenges, and Ethical Considerations*, 3 Forensic Sci. Int'l: Genetics 154, 157 (2009); Pilar N. Ossorio, *About Face: Forensic Genetic Testing for Race and Visible Traits*, 34 J.L. Med. & Ethics 277, 281-83 (2006). Moreover, as population geneticists know, racial profiles of this type will be useless in areas where population groups consist of people of recently mixed ancestry. *See* Pilar Ossorio & Troy Duster, *Race and Genetics: Controversies in Biomedical, Behavioral, and Forensic Sciences*, 60 Am. Psychologist 115, 121 (2005).

number of return hits against a database containing a disproportionate number of African-American DNA profiles will likely ensnare a disproportionate number of African American suspects. *See, e.g.*, Duster, *Selective Arrests, supra*, at 329 ("If the DNA database is primarily composed of those who have been touched by the criminal justice system, and that system has engaged in practices that routinely select more from one group [than] from others, there will be an obvious skew or bias toward this group in the database.").

Importantly, those skewed results will *not* necessarily occur because minorities are more likely to have committed a crime, but rather because greater numbers of innocent minorities have had an encounter with law enforcement than their white counterparts. *See* Pilar Ossorio & Troy Duster, *Race and Genetics: Controversies in Biomedical, Behavioral, and Forensic Sciences*, 60 Am. Psychologist 115, 124 (2005) (explaining that minorities will face a greater likelihood of being identified as "cold hit" suspects based on their disproportionate representation in DNA databases, "even though minorities are no more likely to commit crimes and in some cases are actually less likely to do so"); *see generally* Krimsky & Simoncelli, *supra*, at 254-55 (studies of criminal behavior do not show disproportionate criminal activity by minorities); *Romero Racial Profiling Testimony*, supra, at 5-6 (same). Conversely, those populations that are underrepresented in the database will be underrepresented in criminal investigations arising from DNA searches not because of their relative

innocence, but rather because they have been not been arrested and subjected to DNA collection. *See* Risher, *supra*, at 54; Duster, *Selective Arrests*, *supra*, at 329.

Once minorities are disproportionately identified by way of a DNA match, they will face a correspondingly greater risk of false arrests and false convictions than their white counterparts. Krimsky & Simoncelli, *supra*, at 263. In the context of DNA-based cases, those risks result from a variety of factors, including human error in collecting and processing DNA leading to cross-contamination and mislabeling of samples, testing errors in forensic laboratories leading to false positive matches between DNA profiles, the inherently subjective analysis of mixed DNA samples, and – in some cases – analyst bias. *See* William C. Thompson, *The Myth of Infallibility, in Genetic Explanations: Sense and Nonsense* (Sheldon Krimsky & Jeremy Gruber eds., forthcoming Feb. 2013) (detailing the numerous causes of false DNA matches and resulting false incriminations and convictions); Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 Cal. L. Rev. 721, 753-56, 767 (2007) ("*New Forensics*") (highlighting cases of false positive DNA matches leading to wrongful convictions and imprisonment). Those types of errors have led not only to false incriminations, but to false convictions, as in the case of Dwayne Jackson, who served almost four years in prison for a robbery that he did not commit after a lab technician accidentally switched his DNA sample with the perpetrator's sample. *See*

Jackie Valley, *Metro Reviewing DNA Cases After Error Led to Wrongful Conviction*, Las Vegas Sun, July 7, 2011, http://tinyurl.com/valley-jackson.

Relatedly, innocent minorities faced with DNA evidence inevitably will encounter structural difficulties that make mounting a defense particularly challenging. *See, e.g.*, Thompson, *supra* (discussing barriers and limits to retesting of DNA samples). As Erin Murphy has explained, "structural barriers impede the development of robust 'defense-oriented' forensic research and practices," and requests by defense attorneys for an independent examination of DNA evidence are often met with resistance, refusal, and even hostility. Murphy, *New Forensics*, *supra*, at 747-48; *see id.* at 753 ("Even assuming open access to all the underlying material, defense lawyers would encounter difficulty in finding an expert qualified to conduct research or review."). Moreover, "[t]he very 'scientific' nature of [DNA] evidence bestows an air of reliability that defense attorneys may be loathe to confront." *Id.* at 765.

At a minimum, mounting a successful challenge to DNA evidence requires both financial resources and highly effective advocacy, which minority defendants often lack. Josiah Sutton, an African American who was wrongly convicted of rape based on DNA evidence, provides a powerful example. Sutton sought independent DNA testing during his trial, and claimed on appeal that his attorney was ineffective for not obtaining it. The appellate court, however, concluded that the reasons the attorney provided for not obtaining an independent DNA

analysis – one of which was that the attorney "informed appellant's family he would need more money for the analysis to be performed but they failed to pay it" – were consistent with "reasonable trial strategy." *Sutton v. Texas*, No. 14-99-00951-CR, 2001 WL 40349, at *2 (Tex. Ct. App. – Houston Jan. 18, 2001). Sutton was ultimately exonerated when, after spending four and a half years in prison, a state audit revealed widespread errors with the state crime laboratory that conducted the initial DNA testing. *See* Adam Liptak, *Review of DNA Clears Man Convicted of Rape*, N.Y. Times, Mar. 11, 2003, at A18, *available at* http://tinyurl.com/liptak-sutton; Innocence Project, *Know the Cases – Josiah Sutton*, http://tinyurl.com/sutton-innocence (last visited Jan. 21, 2013).

Because the criminal justice system is administered by individuals who exercise discretion and make errors, some of the consequences that flow from an increased reliance on DNA evidence are inevitable. But the disparate impact that those consequences will have on innocent minorities is not inevitable and will be exacerbated by a DNA database that includes the profiles of large numbers of innocent minority arrestees.

B. Familial Searching Unfairly Targets Innocent Minorities for Investigation.

The expansion of the DNA databases also could subject numerous people of color to law enforcement scrutiny for no other reason than that they have a relative who was once arrested.

Just as collecting and retaining DNA samples from arrestees who are not ultimately convicted implicates innocent people, familial searching targets innocent people by comparing DNA samples that *do not match* crime-scene samples to determine whether the databased person may be a blood relative of the perpetrator of another crime. Once a potential relative is identified, that person and his family members may become the focus of a law enforcement inquiry. In other words, familial searching puts innocent people in jeopardy of police surveillance and investigation simply because one member of their family (who may be an innocent arrestee himself) has a DNA profile on CODIS. *See* Henry T. Greely et al., *Family Ties: The Use of DNA Offender Databases to Catch Offenders' Kin*, 34 J.L. Med. & Ethics 248, 256, 258 (2006).

Familial searching thus creates a troubling regime of "guilt by association," implicating in criminal investigations both innocent arrestees whose DNA has already been collected and members of their family that are not in the database. In many cases, that regime may also lead to family rifts and cause stress or embarrassment for innocent family members of perpetrators. *See, e.g.*, Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 Mich. L. Rev. 291, 313-21 (2010) ("*Relative Doubt*") (raising concerns about privacy and disruption of family relationships; providing example of British teenager whose reckless driving offense led to familial search and arrest of his father and two uncles for murder); *Utilizing DNA Technology To Solve Cold Cases Act of 2011: Hearing*

on H.R. 3361 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 112th Cong. 31 (2012) (Prepared Statement of Henry T. Greely, Professor of Law, Stanford Law School) (criminal investigations involving familial DNA searches could reveal misattributed parentage (*i.e.*, a son learning that he has a different biological father than he thought)).

As with other ramifications arising from a racially unbalanced DNA database, familial searching and the potential harms associated with that investigative technique will be borne more heavily by African Americans for the simple reason that a higher percentage of the African-American population is likely to be closely related to someone in the database. *See* Ram, *supra*, at 789-90 (collecting sources that explain this phenomenon and noting that "expanding database coverage to include offenders' relatives through partial matching grossly amplifies th[e] existing bias" in DNA databases); Murphy, *Relative Doubt*, *supra*, at 322-23 ("[R]eliance on racially disproportionate databases will on average impact the targeting of suspicion, drawing disproportionate attention toward Hispanics and African Americans . . . ."); Suter, *supra*, at 370. Indeed, a widely cited study has estimated that African Americans would be identified as suspects 4 to 5 times more than whites through familial searches and that roughly 17 percent of the African-American population would be "under surveillance," the majority of whom would be relatives of those in the database. Greely et al., *supra*, at 259. Another scholar has collected data showing that Hispanics

are likely to be particularly impacted by familial searching because of their large family structures. *See* Daniel J. Grimm, *The Demographics of Genetic Surveillance: Familial DNA Testing and the Hispanic Community*, 107 Colum. L. Rev. 1164, 1177-85 (2007).

The disparate impact of familial searching is *per se* problematic because it will unfairly subject innocent minorities to increased scrutiny by law enforcement. Similarly distressing, however, is the *perception* of racial bias in DNA databases that familial searches may create. As Erin Murphy has explained, "[u]sing offender databases to find relatives sends a message that in cases where there is no evidence of the perpetrator's identity or ethnicity, it is fair to focus suspicion on not just the usual suspects, but also the innocent relatives of the usual suspects." Murphy, *Relative Doubt*, *supra*, at 323; *see also* Krimsky & Simoncelli, *supra*, at 88 (noting that racial disparities in the criminal justice system, "combined with the increasing use of familial searches, may have the deeper impact of reiterating the faulty and highly dangerous notion that criminal propensity is genetic and racialized"). To the extent that people of color view the use of DNA databases to conduct familial searching as "another racist action by the American criminal justice system," *Greely* et al., *supra*, at 259, using DNA databases in this way may further delegitimize law enforcement efforts in minority communities. *See* Murphy, *Relative Doubt*, *supra*, at 323; *cf.* D.H. Kaye & Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage*, 2003

Wis. L. Rev. 413, 458 (arguing that a racially imbalanced arrest-based DNA database "would further damage the legitimacy of the criminal law and of law enforcement agencies in areas where public safety is most in disrepair").

Concerns about familial searching are far from hypothetical. State policies vary widely and are often either unwritten or difficult to access, *see* Ram, *supra*, at 767-83, but at least four states – California, Colorado, Virginia, and Texas – have written policies that explicitly permit familial searches.[16] *See* Laboratory Services, FBI, *Familial Searching*, http://tinyurl.com/fbi-familialsearching (last visited Jan. 10, 2013). States that engage in familial searching are permitted to use software to search CODIS for partial matches and to share information between states.[17] *See* Ram, *supra*, at 762, 785; Jeffrey Rosen, *Genetic Surveillance For All*, Slate (Mar. 17, 2009, 4:52 PM), http://tinyurl.com/rosen-surveillance (last visited Jan. 10, 2013).

Moreover, in the absence of definitive policies, many individual laboratories have conducted familial searches on their own. *See* Ram, *supra*, at 762. Given that the unmistakable trend has been to expand the uses of DNA databases over the course of their short history, it is likely only a matter of time

---

[16] By contrast, only two jurisdictions have laws explicitly prohibiting such searches. *See* D.C. Code § 22-4151(b); Md. Code Ann., Pub. Safety § 2-506(d).

[17] Although familial searching does not currently occur at the federal level, there has been legislative interest in adopting it. *See* Utilizing DNA Technology to Solve Cold Cases Act of 2011, H.R. 3361, 112th Cong. (2011).

before familial searches take hold more broadly. In the meantime, the increasing use of familial searches likely will contribute to the undue focus of criminal investigations in minority communities, a problem that will be aggravated by the inclusion of arrestees in DNA databases.

C. The Experience In The United Kingdom Provides A Window Into The Future Of DNA Databanking In The United States.

As the discussion above makes clear, the concerns about adding innocent arrestees to DNA databases are well-founded. One need only look to the United Kingdom to see the problems associated with creating a massive, racially disproportionate database that contains the DNA profiles of large numbers of innocent minorities. Indeed, the story of forensic DNA collection in the United Kingdom highlights both the problem of stigmatization that comes with comingling the DNA of innocent minorities and convicted felons and the harms of creating a system that prevents innocent people from having their DNA removed from the database.

The United Kingdom began collecting forensic DNA samples in 1984 and established its National DNA Database ("NDNAD") in 1995. Krimsky & Simoncelli, *supra*, at 169-70. Similar to the trend in the United States, DNA collection in the United Kingdom underwent a series of expansions over a relatively short period of time, eventually being broadened to include anyone over the age of 10 years

old arrested for a "recordable offense."[18] *Id.* at 171-72. As a result, the NDNAD is the "oldest, largest per capita, and most inclusive national forensic DNA database in the world." *Id.* at 167. As of September 2012, the NDNAD contained DNA profiles of approximately 9.6% of the total population in the United Kingdom. *Compare* Office for Nat'l Statistics, Statistical Bulletin, *2011 Census: Population Estimates for the United Kingdom*, 27 March 2011 (Dec. 2012), http://tinyurl.com/UKtotalpop (total population of United Kingdom is 63.2 million), *with* Nat'l Policing Improvement Agency, Statistics, NDNAD Breakdown, http://tinyurl.com/ndnadtotal (estimated total number of individuals retained on NDNAD is 6.07 million).

Also similar to forensic DNA databases in the United States, racial disparities at all stages of the criminal justice system have contributed to a severe disproportionality in the racial composition of the NDNAD: as of 2009, the database contained DNA profiles of almost 40% of black men and more than 3/4 of black men between the ages of 18 and 35. *See* Human Genetics Comm'n, *Nothing to Hide, Nothing to Fear?: Balancing Individual Rights and the Public Interest in the Governance and Use of the National DNA Database* 3 (Nov. 2009), *available at*

---

[18] A recordable offense includes not only all offenses punishable with imprisonment, but also many other offenses that police keep on record. *See* The National Police Records (Recordable Offences) Regulations, 2000, S.I. 2000/1139 (U.K.); *see also, e.g.*, The National Police Records (Recordable Offences) (Amendment) Regulations, 2012, S.I. 2012/1713 (Eng. & Wales); The National Police Records (Recordable Offences) (Amendment) Regulations, 2007, S.I. 2007/2121 (Eng. & Wales).

http://tinyurl.com/hgc-ndnadreport. By contrast, only 6% of adult white males had DNA profiles in the NDNAD. Krimsky & Simoncelli, *supra*, at 179 (citing Nick Taylor, *Genes on Record – One Size Fits All?*, 156 New L.J. 1354 (2006)).

Those shocking disparities caught the attention of public officials, leading the British House of Commons Home Affairs Committee to conclude that the United Kingdom was "moving unwittingly towards a situation where the majority of the black population will have their data stored on the DNA database," and to express concern that "young black people who have committed no crime are far more likely to be on the database than young white people." House of Commons, Home Affairs Committee, *Young Black People and the Criminal Justice System*, Second Report of Session 2006-07, Vol. 1 ¶ 33 (May 22, 2007), *available at* http://tinyurl.com/homeaffairsrpt ("*Home Affairs Committee Report*"). Non-governmental entities similarly warned that the racial disparities in the NDNAD "increase the risk of stigmatisation attendant on being known to have a profile on the NDNAD and can potentially lead to further alienation of whole ethnic communities." Nuffield Council on Bioethics, *The Forensic Use of Bioinformation: Ethical Issues* 57 (2007); *see also Home Affairs Committee Report* ¶ 33 (expressing doubt that those disparities "can be justified on grounds of equity or of public confidence in the criminal justice system").

The United Kingdom has also had to grapple with the problem of retaining the DNA profiles of innocent

arrestees. Laws in the United Kingdom governing the expungement of DNA profiles have undergone a series of changes since the introduction of DNA collection in 1984, but from 2003 until recently, England, Wales, and Northern Ireland permitted the indefinite retention of DNA information from anyone, including non-convicted arrestees.[19] *See* Criminal Justice Act 2003, 2003 c.44, Pt. 1, § 10 (expanding collection of DNA samples to those in police detention after arrest); Criminal Justice and Police Act 2001, 2001 c.16, Pt. 3, § 82 (removing obligation to destroy DNA sample after individual is neither prosecuted nor cleared). In recent years, British Parliament has amended those laws to provide greater protections for innocent people who have been subjected to DNA sampling. *See* Krimsky & Simoncelli, *supra*, at 178-85; Protection of Freedoms Act 2012, 2012 c.9, Pt. 1, ch. 1; Crime and Security Act 2010, 2010 c.17, Pt. 14, § 2. Those amendments were prompted not only by public concerns about the disproportionate number of minorities with profiles in the NDNAD, but also by a decision by the European Court of Human Rights that the United Kingdom's indefinite retention of DNA information violated the European Convention on Human Rights. *See S. & Marper v. United Kingdom*, 2008 Eur. Ct. H.R. 1581, ¶¶ 125-126; *see id.* ¶ 122 (recognizing the risk of stigmatization "stemming from the fact that persons in the position

---

[19] In 2006, the Scottish Parliament rejected a proposal that would have permitted broad retention of DNA information from arrestees, opting instead for a much more limited approach similar to the system that the British Parliament enacted in 2012.

of the applicants, who have not been convicted of any offence and are entitled to the presumption of innocence, are treated in the same way as convicted persons").

As the British experience demonstrates, the dangers of collecting and storing DNA information from mere arrestees is not unique to the American criminal justice system. The problems exposed through that experience should serve as a warning about the expansion of DNA databases to include innocent minority arrestees in this country.

CONCLUSION

Amicus CRG respectfully urges the Court to affirm the judgment of the Maryland Court of Appeals.

Respectfully submitted,

JEREMY GRUBER
COUNCIL FOR
RESPONSIBLE GENETICS
5 Upland Road, Suite 3
Cambridge, MA 02140
(617) 868-0870

MATTHEW S. HELLMAN
Counsel of Record
LEAH J. TULIN
R. TRENT MCCOTTER
RUKKU SINGLA*
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
(202) 639-6000
mhellman@jenner.com

*Admitted in Ohio only; supervised by principals of the firm

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
JAN 2 – 2013
OFFICE OF THE CLERK

No. 12-207

IN THE

Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,
v.
ALONZO JAY KING, JR.,
Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF FOR AMICI CURIAE DNA SAVES, BRING BRI JUSTICE FOUNDATION, KEEP GEORGIA SAFE, THE RAPE, ABUSE & INCEST NATIONAL NETWORK, AND THE SURVIVING PARENTS COALITION IN SUPPORT OF PETITIONER

JONATHAN S. FRANKLIN*
MARK EMERY
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0466
jfranklin@fulbright.com

* Counsel of Record

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 7

ARGUMENT 8

I. GOVERNMENTS HAVE COMPELLING INTERESTS IN USING ARRESTEE DNA IDENTIFICATION TO COMBAT CRIME AND PROTECT THE INNOCENT 8

II DNA IDENTIFICATION IMPLICATES NO PROTECTED PRIVACY INTERESTS OF ARRESTEES 19

III. THIS CASE SHOULD NOT BE DECIDED BASED ON HYPOTHETICAL SCENARIOS 27

CONCLUSION 33

TABLE OF AUTHORITIES

Page(s)

CASES:

Amalgamated Ass'n of Street, Elec. Railway & Motor Coach Empl. of Am. v. *Wisc. Empl. Rel. Bd.*, 340 U.S. 383 (1951) 28

Anderson v. *Commonwealth*, 274 Va. 469, 650 S.E.2d 702 (2007) 23

Bell v. *Wolfish*, 441 U.S. 520 (1979) 20

Boroian v. *Mueller*, 616 F.3d 60 (1st Cir. 2010) 25

Georgia v. *Randolph*, 547 U.S. 103 (2006) 28

Green v. *Berge*, 354 F.3d 675 (7th Cir. 2004) 21

Haskell v. *Harris*, 669 F.3d 1049 (9th Cir.), *vacated on grant of reh'g en banc*, 686 F.3d 1121 (9th Cir. 2012) ..... *passim*

Illinois v. *Lafayette*, 462 U.S. 640 (1983) 20

In re Welfare of C.T.L., 722 N.W.2d 484 (Minn. Ct. App. 2006) 9

Johnson v. *Quander*, 440 F.3d 489 (D.C. Cir. 2006) 24

Jones v. *Murray*, 962 F.2d 302 (4th Cir. 1992) 20, 23, 24

King v. *State*, 425 Md. 550, 42 A.3d 549 (2012) ..... *passim*

Mario W. v. *Kaipio*, 230 Ariz. 122, 281 P.3d 476 (2012) 22, 25

TABLE OF AUTHORITIES—Continued

Page(s)

Maryland v. *King*, 133 S. Ct. 1 (2012) 9

National Treasury Employees Union v. *Von Raab*, 489 U.S. 656 (1989) 29

People v. *Buza*, 129 Cal. Rptr. 3d 753 (Cal Ct. App. 2011), *review granted*, 132 Cal. Rptr. 3d 616, 262 P.3d 854 (Cal. 2011) 17, 22, 25

Postal Service v. *Gregory*, 534 U.S. 1 (2001) 29

Rakas v. *Illinois*, 439 U.S. 128 (1978) 24

Samson v. *California*, 547 U.S. 843 (2006) 20

Smith v. *Indiana*, 744 N.E.2d 437 (Ind. 2001) 25

United States v. *Amerson*, 483 F.3d 73 (2d Cir. 2007) 25

United States v. *Karo*, 468 U.S. 705 (1984) 29

United States v. *Kincade*, 379 F.3d 813 (9th Cir. 2004) (en banc) ..... *passim*

United States v. *Mitchell*, 652 F.3d 387 (3d Cir. 2011) (en banc) 21, 23, 27

United States v. *Sczubelek*, 402 F.3d 175 (3d Cir. 2005) 15, 18, 21, 24

Wilson v. *Collins*, 517 F.3d 421 (6th Cir. 2008) 25

STATUTES AND REGULATIONS:

42 U.S.C. § 14133(c) 30

42 U.S.C. § 14135a 8

TABLE OF AUTHORITIES—Continued

Page(s)

42 U.S.C. § 14135e(c) 8, 30

61 Fed. Reg. 37,495 (1996) 31

Conn. Gen. Stat. Ann. § 54-102g(a) (2012 Supp.) 9

Justice for All Act of 2004, Pub. L. 108-405, § 203(f), 118 Stat. 2260 27

Md. Code, Pub. Safety Art. § 2-504(a) 12

Md. Code Regs. 29.05.01.06 (2012) 30

Okla. Stat. Tit. 74 § 150.27a 9

LEGISLATIVE MATERIALS:

151 Cong. Rec. S9528 (July 29, 2005) 16

155 Cong. Rec. S12905 (Dec. 10, 2009) 31

158 Cong Rec. H6844-48 (Dec. 18, 2012) 3

158 Cong. Rec. S8516 (Dec. 28, 2012) 3

H.R. Rep. No. 106-900, pt. 1 (2000) 28, 30

Katie Sepich Enhanced DNA Collection Act, H.R. 6014, 112th Cong (2012) 3

OTHER AUTHORITIES:

Andrew Blankstein, *et al.*, *DNA Analysis Links Inmate to 12 Slayings*, L.A. Times, Oct. 23, 2004 16

Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2006* 10

Bureau of Justice Statistics, *Recidivism* 10

TABLE OF AUTHORITIES—Continued

Page(s)

Bureau of Justice Statistics, *State Court Sentencing of Convicted Felons, 2004—Statistical Tables* 11

John M. Butler, *Forensic DNA Typing: Biology, Technology, and Genetics of STR Markers DNA Initiative* (2d ed. 2005) 18

Cal. Dep't of Justice, *Impacts of Buza Decision on CAL-DNA Submissions and Hits, June 2011-March 2012* 17

Cal. Dep't of Justice, *Effects of the All Adult Arrestee Provision* 14, 17

J.M. Chaiken *et al.*, *Varieties of Criminal Behavior* 44 (1982) 10

Laylan Copelin, *Abuse of DNA Would Be A Felony Under Legislation*, Austin American-Statesman, June 9, 2001 13

Chicago Study on Preventable Crimes 15

Denver DA, *Denver's Study on Preventable Crimes* 14

Denver DA, *Washington State Preventable Crime Study* (2008) 13

DNA Initiative, *Combined DNA Index System* 12

Jules Epstein, "*Genetic Surveillance*"—*The Bogeyman Response to Familial DNA Investigations*, 2009 U. Ill. J.L. Tech. & Pol'y 141 (2009) 21

FBI, *CODIS Combined DNA Index System* 12

TABLE OF AUTHORITIES—Continued

Page(s)

FBI, *CODIS—NDIS Statistics* 18

A. Nicholas Groth, *et al.*, *Undetected Recidivism Among Rapists and Child Molesters*, 28 Crime & Delinquency 450 (1982) 10

James E. Hooper, *Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act*, 89 Mich. L. Rev. 1951 (1991) 10

Brad Kava, *Teen Arrested for Raping Santa Cruz Woman*, Santa Cruz Patch, May 12, 2011 14

Alexis Krell, Bill Would Allow Testing of DNA Upon Arrest, The News Tribune, Jan. 25, 2012 12

Man Who Killed 11-Year-Old Girl Sentenced to 59 Years in Prison, KOB.com, Nov. 22, 2011 15

Maryland Criminal Justice Info. Sys., *Maryland Study on Preventable Crimes* 15

Nat'l Inst. of Justice, *States That Have Enacted Arrestee DNA Collection Laws in the United States* (Dec. 7, 2012) 8

The National Registry of Exonerations, *David Allen Jones* 16

Jessica M. Pasko, *Watsonville Man Sentenced to 15 Years in Sexual Assault Case*, Santa Cruz Sentinel, Sept. 24, 2012 14

Joan Petersilia, *When Prisoners Come Home* (2003) 10

TABLE OF AUTHORITIES—Continued

Page(s)

John K. Roman, *et al.*, *The DNA Field Experiment: Cost-Effectiveness Analysis of the Use of DNA in the Investigation of High-Volume Crimes* 13 (Urban Inst. Justice Pol'y Ctr. 2008) 10

Scott Sandlin, *Man Confessed To Murder He Didn't Commit*, Albuquerque Journal, Aug. 14, 2010 16

Sierra LaMar Slaying Suspect Charged In Attempted Kidnappings, Los Angeles Times, Nov. 14, 2012 14

Serial Rapist Gets 227-Year Prison Sentence, KOMOnews.com (Nov. 20, 2008) 12

State of Virginia, Dep't of Forensic Science, *DNA Databank Statistics* 16

Webster's Third New International Dictionary (2002) 23

Ray A. Wickenheiser, *The Business Case for Using Forensic DNA Technology to Solve and Prevent Crime*, 7 J. BioLaw & Bus. 34 (2004) 19

Kimberly White, *DNA Hit Leads Police to Watsonville Man Arrested for Kidnapping and Assaulting Woman*, Santa Cruz Sentinel, May 12, 2011 14

IN THE

Supreme Court of the United States

No. 12-207

STATE OF MARYLAND,

Petitioner,

v.

ALONZO JAY KING,

Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF FOR AMICI CURIAE DNA SAVES, BRING BRI JUSTICE FOUNDATION, KEEP GEORGIA SAFE, THE RAPE, ABUSE & INCEST NATIONAL NETWORK, AND SURVIVING PARENTS COALITION IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE

DNA Saves is a 501(c)(4) non-profit association that educates policy-makers and the public about the value of forensic DNA.[1] DNA Saves was formed by

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The following persons made such a monetary contribution: Julia Adams, Merideth Alston, Lilly Anaya, Mike Antiporda, Jill Barkley, Magi Bish, John Bish, Patti Bishop, Boyea Law Office, Joe & Jill Brininstool, Ken Britt, Sharon Brooks, Cathrynn Brown, Jane Bujac, Margot Cabrera, Carlsbad Radio Inc., Joe & Judy Carrasco, Martha Chapman, Carol Chelkowski, Mike

Cleary, Anthony & Arlene Cooper, Wanda Cotton, Gayle Cowart, Kathy Cox, BA Crawford, Susan & Jason Crockett, Debe Culberson, Mike Currier, Linda Dages, Steve Daley, Rosemarie D'Allessandro, Becca DeMauro, Denise Madrid, Christy Dickerson, Kristen Dietz, Kay Doss, Keri Drexel, Carla Duarte, Michelle Duffy, Jay & Tracy Francis, Ellen-Beth Fullwood, David & Cheryl Gallegos, Avelino Garcia, Lindsay Garza, Cha Cha Gillette, Garth & Heidi Goodey, JR & Peggy Gratton, Father Tom Gray, Alton & Susie Green, Donna Gren, Joan Hargrave, Ron Head, John & Julia Heaton, Leslie Heinsch, Gary Henning, Veronica Hernandez, Brad Herndon, Scott & Kathleen Hillyard, Bob & Betti Hodges, Shawna Hooper, Jaren F. Howard, Dale & Cheryle Janway, Tricia Johnson, Chris Jones, Vicki Kelly, Drew Kesse, Joyce Kesse, Mr. & Mrs. Don Kidd, Jody Knox, Mary Kozakiewicz, Tom Lairson, Patty Lairson, Matt Leroch, Life Technologies, ita London, Joe Lopez, SA Lott, Justin Lovell, Mark Lunsford, Doug Lyall, Donavan Majer, Clinton & June Marrs, Beverly Mars, Janis McCall, Phyllis & Chuck McEndree, Sarah McEndree, Farrah Mendoza, Mike McNamara, Jerri McTaggart, Michelle Mesarchik, Mika Moulton, Cathy Muncrief, Bob & Judy Murray, Doug & Laura Neal, Colleen Nick, Cynthia Norman, Judy Norman, Ofelia Orgega, Don Owen, Robert Duane Patterson, Stayce Pead, Kathy Pichler, Abby Potash, PR Consultants, Inc., Wren Prather-Stroud, Sergio Ramos, Christina Ramos, Jannel Rap, Terry Reed, Kayleen Reed, Randy Richardson, Karen Richardson, Ahmad Rivazfar, Mike & Colleen Rogers, Kimberly Rogge-Rogers, Randy Rominger, Bob & Susan Roth, Erin Runnion, Elaine Runyon-Simmons, Carol Ryan, Mark & Debra Schinnerer, Mark Sconce, Cindy Sconce, Dawn Semmler, SEPCO, Inc., Michael & Karen Sepich, Hilary Sessions, Roger & Cindy Short, Kassie Simmons, Ed Smart, Sherri Smith, Laurie Smith, Tory Smith, Missey Smith, Gay Smither, Rick Sneathen, Sam Soto, Mark & Debra Stanger, Craig & Sheri Stephens, Betty Stringfellow, Clifford Stroud, Mike & Brenda Sugga, Daniel Suniga, Kathy Teague, Diena Thompson, Patty Tiscareno, Paul & Janis Trone, Katie Trotter, Danielle Trotter, Debe Wagner, Pattie Walker, Sara Walker, Frank Walker, Linda Walker, Mr. & Mrs. W.B. Waters, Western Commerce Bank, Dennis & Jayne Westfall, Janelle Whitlock, Ryan Williamson, Priscila Williamson, Kelly Yates, Maggie Zingman. The parties have filed letters with the Court consenting to the filing of this brief.

Jayann and David Sepich in late 2008, marking the five year anniversary of the vicious murder of their daughter, Katie. Had a DNA sample been taken from Katie's murderer, Gabriel Avilla, upon arrest for an unrelated crime, the Sepichs would have discovered who killed their daughter only three months after her death. Instead, Avilla remained free for over three years to victimize more daughters, while the Sepichs waited for answers. The Sepichs hope that by advocating for better DNA testing laws they can prevent other parents from asking "why?"

DNA Saves is committed to working with every state and the federal government to pass laws allowing DNA to be taken upon arrest, and to provide meaningful funding for DNA programs. In January 2007, New Mexico implemented "Katie's Law," which requires DNA profiles for most felony arrestees to be included in the federal database known as CODIS. New Mexico's program has already registered at least 385 matches of unsolved crimes to 339 individual arrestee DNA profiles. Twenty-seven of those matches identified suspects in unsolved murders, and 56 identified suspects in unsolved sex-related crimes. The very first arrestee sample was matched to a double homicide case, leading to a conviction.

Just recently, on December 28, 2012, Congress passed the Katie Sepich Enhanced DNA Collection Act, which will provide grants to states that implement arrestee DNA identification laws. *See* H.R. 6014, 112th Cong (2012); 158 Cong. Rec. S8516 (Dec. 28, 2012); 158 Cong Rec. H6844-48 (Dec. 18, 2012). DNA Saves is vitally committed to ensuring that courts correctly apply the Constitution and allow legislatures to enact these sensible and effective laws.

Bring Bri Justice Foundation is a 501(c)(3) nonprofit foundation dedicated to passing "Brianna's Law" in Nevada. Brianna's law would require that all people arrested for a felony have their DNA profiles taken upon arrest and entered into CODIS. The foundation was formed in 2008 by Bridgette Zunino Denison, and Lauren Denison after the murder, abduction and rape of their daughter and niece, Brianna Denison.

The man who was ultimately convicted for Brianna Denison's rape and murder was James Biela. Biela had been previously arrested and had also committed two rapes and an attempted rape prior to murdering Brianna. There was DNA evidence in one of the prior crimes. While it cannot be said with absolute certainty that a DNA profile taken at the time of Biela's first arrest would have saved Brianna Denison's life, we do know that without that profile there was no chance for an earlier identification of Biela that could have prevented Brianna's murder. We can, however recreate the timeline and determine that had a DNA profile been present in CODIS as a result of Biela's first arrest, Biela would have been identified as a suspect very shortly after the crime scene was processed instead of ten months later. Bring Bri Justice Foundation believes that it is crucial to the safety of our children and loved ones that we catch these criminals sooner rather than later, so that no other family has to go through the horrific trauma experienced by the family of Brianna Denison.

Keep Georgia Safe is a nonprofit 501(c)(3) organization with the mission to provide safety education and crime prevention training to children and families. Keep Georgia Safe has a two-pronged

approach to crime prevention: (1) Proactive: Safety education and personal empowerment training; and (2) Reactive: CART (Child Abduction Response Team) training for first responders, and support for an arrestee DNA law. Keep Georgia Safe believes that DNA evidence has been the most effective and valuable weapon to identify perpetrators in unsolved rape or murder cases, while helping to exonerate those under suspicion or falsely accused. It supports a law that would require all felony arrestees to provide a DNA sample at booking, when fingerprints and mug shots are collected.

The Rape, Abuse & Incest National Network ("RAINN") is the nation's largest anti-sexual violence organization. RAINN, a 501(c)(3) non-profit organization, is dedicated to fighting sexual violence and supporting survivors. Founded by Scott Berkowitz in 1994 with the creation of the National Sexual Assault Hotline, RAINN's mission is to provide direct help to survivors; educate the public about prevention, public policy and recovery; and improve the criminal justice response to rape to ensure that more rapists are brought to justice.

Every two minutes, another American is sexually assaulted. Yet only three out of every 100 rapists will ever spend a day in prison. While many of these cases are never reported to police, DNA identification provides the ability to solve a growing number of the crimes that are reported. Further, DNA evidence not only helps police identify rapists in existing unsolved cases, it also prevents future assaults and spares potential new victims by bringing perpetrators to justice early in their criminal careers. Prosecuting rapists early on is the single most effective rape prevention method available, yet its value would be

limited by forcing states to restrict current DNA collection policies. That is why RAINN is committed to creating safer communities by working with lawmakers to expand the use of DNA evidence, including the passage of state and federal laws that allow DNA profiles to be collected upon arrest.

The Surviving Parents Coalition ("SPC") is a 501(c)(4) non-profit organization that advocates for education and legislation that will aid in the prevention of crimes against children and young people, especially child sexual abuse, sexual assault, exploitation, abduction and murder. SPC is a group of parents who have suffered one or all of the above crimes against their children. One of SPC's primary initiatives includes advocating for the taking of DNA profiles on felony arrest. The majority of SPC's members had children that were the victims of a repeat offender. Had a DNA profile been taken from their children's attackers, there would have been less heartache and many less crimes. SPC hopes that by advocating for better DNA identification laws we can prevent other parents from suffering the same.

SPC is committed to reach out to every state and the federal government to pass laws allowing DNA profiles to be taken upon arrest. SPC views DNA identification upon felony arrest as the 21st Century fingerprint. The technology is available and SPC is committed to ensuring that courts correctly apply the Constitution and allow legislatures to enact these laws. The resolution of this issue will have a direct and profound effect on SPC's efforts to expand the use of DNA identification of arrestees throughout the country so that more recidivist crime can be prevented.

SUMMARY OF THE ARGUMENT

The Maryland Court of Appeals improperly held that arrestees' rights to shield their identities to avoid being linked to crimes trumps the government's compelling interest in solving and preventing crime. When respondent Alonzo King was arrested in 2009, his DNA profile—thirteen otherwise meaningless chemical markers that uniquely identify every person—was determined and matched against an FBI database. He was then identified as the man who had broken into a woman's home six years earlier and brutally raped her, and was convicted of that heinous crime. Untold numbers of other cases have been solved and recidivist crimes prevented through this simple but powerful technological development.

Yet the court below threw out King's conviction, wrongly holding that he and all other arrestees have a constitutional right to withhold this identifying information so that nobody can ever link them to other crimes. DNA identification is a crucial public safety tool that involves no private information. Arrestees, who have diminished privacy expectations, have no right to shield purely identifying information. They are always required to provide multiple forms of identification—including fingerprints, photographs, and drivers' licenses—regardless of whether their names are already known. A DNA profile is just another unique identifier. Like all these other identification techniques, DNA profiling under stringent legal protections is minimally intrusive and useful only for identification. A cheek swab is a *de minimis* inconvenience. And arrestees have no greater interest in withholding the identifying information used in DNA finger-

printing than in withholding traditional fingerprints. The only difference is that it is a better means of identification that is more effective in protecting the public from recidivists like Alonzo King.

Nor should King walk free based on rank speculation that law enforcement might break the law and conduct additional analyses on DNA samples to learn other information. This case should be resolved based on the actual facts, not hypothetical fantasies. The only relevant search entailed by DNA identification occurs when the sample is taken and analyzed to determine the identifying markers. Federal and state law strictly forbids the collection or use of any DNA information beyond the otherwise meaningless markers used in identification. Nor is there any reason why someone would risk criminal sanctions by surreptitiously obtaining and re-analyzing an arrestee DNA sample, given the lack of any motive to do so and the ease with which samples can be obtained through other legitimate means. It is not surprising, then, that there is no documented instance of anyone misusing samples for unauthorized purposes. But if such a new search were ever to occur, courts could address it then.

ARGUMENT

I. GOVERNMENTS HAVE COMPELLING INTERESTS IN USING ARRESTEE DNA IDENTIFICATION TO COMBAT CRIME AND PROTECT THE INNOCENT.

In addition to Maryland and the federal government, 27 states have passed legislation to allow for collection of arrestee DNA profiles. *See* 42 U.S.C. § 14135a; Nat'l Inst. of Justice, *States That Have Enacted Arrestee DNA Collection Laws in the*

United States (nij.gov/topics/forensics/evidence/dna/collection-from-arrestees.htm#overviewof).[2] And just recently, Congress passed the Katie Sepich Enhanced DNA Collection Act, which will provide grants to states that implement arrestee DNA identification laws. *See supra* at 3. As amici and many of their members can attest first-hand, the drive to enact many of these laws came from citizens who were exposed to terrifying and humiliating crimes, suffered deeply painful losses and who—far from seeking to foment a conspiracy to pry into arrestees' genomes—simply want to spare others the bitter fate that has visited their own lives.

The limited, regulated use of DNA technology authorized by these laws can easily prevent such harms. Compared to the non-existent intrusion on an arrestee's legitimate privacy interests, the government's interest in using DNA identification is measured, appropriate and eminently justifiable. As Chief Justice Roberts recognized in granting a stay in this case, arrestee DNA identification "provides a valuable tool for investigating unsolved crimes and thereby helping to remove violent offenders from the general population. Crimes for which DNA evidence is implicated tend to be serious, and serious crimes cause serious injuries." *Maryland* v. *King*, 133 S. Ct. 1, 2 (2012).

---

[2] This includes Minnesota, which ceased collection from arrestees after its law was improperly enjoined in *In re Welfare of C.T.L.*, 722 N.W.2d 484 (Minn. Ct. App. 2006), Oklahoma, which collects profiles only from arrestees who are aliens unlawfully present under federal immigration law, Okla. Stat. Tit. 74 § 150.27a, and Connecticut, which collects profiles only from arrestees previously convicted of felonies, Conn. Gen. Stat. Ann. § 54-102g(a) (2012 Supp.).

Arrestee DNA identification is particularly appropriate because it provides a tool to combat an essential characteristic of criminal conduct: most offenders do not strike just once. Seventy percent of America's crime is committed by only six percent of its criminals. *See* James E. Hooper, *Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act*, 89 Mich. L. Rev. 1951, 1951 n.3 (1991). And this does not include the many crimes that are never resolved. For example, studies show that for every burglary conviction obtained through DNA matches, 7.4 additional crimes are avoided. John K. Roman, *et al.*, *The DNA Field Experiment: Cost-Effectiveness Analysis of the Use of DNA in the Investigation of High-Volume Crimes* 13 (Urban Inst. Justice Pol'y Ctr. 2008). Some serial burglars are individually responsible for more than 200 crimes a year. J.M. Chaiken *et al.*, *Varieties of Criminal Behavior* 44 (1982). Sexual assault offenders commit an average of eight sexual assaults for every one detected. A. Nicholas Groth, *et al.*, *Undetected Recidivism Among Rapists and Child Molesters*, 28 Crime & Delinquency 450-458 (1982).

Expanding DNA databases to include profiles taken from arrestees vastly expands the capacity to match crimes by repeat offenders. Arrestees are far more likely than the general public to be recidivists. Approximately 77% of arrestees have prior arrests, 69% have multiple prior arrests and 61% have at least one prior felony conviction. *See* Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2006* at 4-5 (bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf). By contrast, only about 6.5% of the U.S. population has ever had a felony conviction. *See* Joan Petersilia, *When Prisoners Come Home* 215

(2003) (data as of 2002). In a fifteen State study, over two-thirds of released prisoners were rearrested within three years. Bureau of Justice Statistics, *Recidivism* (bjs.ojp.usdoj.gov/content/reentry/recidivism.cfm).

It is critical, moreover, that DNA identification be performed at the outset of the criminal process—at arrest—rather than waiting for a conviction that may never occur or may only occur much later. As a result of plea bargains or dismissals for various reasons that may not relate to a case's merits, most felony arrests do not result in a conviction. Only 25-68% of arrests for violent felonies lead to convictions, with the percentage even lower for non-violent crimes. *See* Bureau of Justice Statistics, *State Court Sentencing of Convicted Felons, 2004—Statistical Tables* (from 25% for aggravated assault to 68% for murder) (http://bjs.ojp.usdoj.gov/content/pub/html/scscf04/tables/scs04108tab.cfm). And where there is a felony conviction, it may come many months later, with the defendant often out on bail in the interim. Thus, if DNA identification is not performed at arrest, recidivist criminals will remain on the streets to potentially victimize others.

This case puts these statistics in cold relief. As has happened numerous times across the Nation with respect to other arrestees, the identifying information in Alonzo King's arrestee DNA profile enabled law enforcement to solve a horrific crime committed by a proven recidivist. In 2003, King broke into a 53-year old woman's house in Salisbury, Maryland and viciously raped her at gunpoint. Because King was wearing a scarf over his face and a hat pulled over his head, his victim was unable to identify him. There was also no fingerprint evidence available.

Pet. 24. But a DNA profile from his semen was taken and catalogued in the federal CODIS database.[3]

In 2009, King was arrested on unrelated assault charges. Because he was charged with crimes of violence, Maryland law required collection of his "DNA fingerprint" along with traditional fingerprinting. *King* v. *State*, 425 Md. 550, 556-57, 42 A.3d 549 (2012). He was then identified as the 2003 rapist and convicted of that crime. However, because the 2009 arrest was pleaded down to a misdemeanor, *id.* at 556 n.3, that conviction would not have led to a separate DNA identification under Maryland law. *See* Md. Code, Pub. Safety Art. § 2-504(a). Thus, without DNA identification at arrest, King would not have been identified as the Salisbury rapist.

There are many other examples of how arrestee DNA has solved past crimes and prevented future ones. On October 9, 2005, Charisa Nicholas was awakened by a masked gunman who broke into her North Tacoma, Washington home in the middle of the night.[4] She was bound and forced to watch as

---

[3] The Combined DNA Index System ("CODIS") permits participating law enforcement laboratories to share and compare data by providing a central database of DNA profiles from all user laboratories, known as the National DNA Index System ("NDIS"). *See* FBI, *CODIS Combined DNA Index System* (www.fbi.gov/about-us/lab/codis/codis_brochure). The DNA identity profiles in NDIS, which are not indexed by name, are searched weekly, and matches to forensic data are automatically returned by the software to the laboratory that originally submitted the profile. DNA Initiative, *Combined DNA Index System* (www.dna.gov/dna-databases/codis).

[4] *See generally* Alexis Krell, *Bill Would Allow Testing of DNA Upon Arrest*, The News Tribune, Jan. 25, 2012 (www.thenewstribune.com/2012/01/25/1997660/bill-would-allow-testing-of-dna.html); *Serial Rapist Gets 227-Year Prison*

her best friend was raped. The man that tortured Charisa and her friends that night was a serial rapist named Anthony Dias. He later victimized 22 other women and children. All those crimes could have been prevented if DNA identification had been conducted in July 31, 2005, when Dias was arrested for reckless driving and felony hit-and-run. *See* Denver DA, *Washington State Preventable Crime Study* (2008) (www.denverda.org/DNA_Documents/Arrestee_Database/WA%20Preventable%20Crime.pdf). If the state of Washington had implemented such testing at that time, Mr. Dias could have been identified when he committed his next rape only a month later and taken off the streets. The horrible crimes committed against Charisa and her friends and 22 others would have been prevented.

In Texas, Christopher Dye raped three women before being arrested in 1993 for burglary. Unaware he was a serial rapist, authorities released him on bail. Over the next six months, Dye raped four more women before being arrested for burglary. After two months in jail, he raped seven more women before finally being caught. Testing Dye upon his first burglary arrest could have led to a DNA match from his first three crimes, and prevented eleven others. *See* Laylan Copelin, *Abuse of DNA Would Be A Felony Under Legislation*, Austin American-Statesman, June 9, 2001, at A1.

In California, because a DNA sample was taken from Octavio Castillo at his 2011 arrest for receiving stolen property, he was identified as the man who, only months earlier, had kidnapped a woman while

---

Sentence, KOMOnews.com, Nov. 20, 2008 (www.komonews.com/news/local/19220409.html).

she was walking home and sodomized and severely beat her. [5] He was identified and convicted based on a match to his DNA profile taken at the earlier arrest, for which he was still out on bail. According to police, "[t]his case never would have been solved without the DNA evidence," or "it might have taken a long time to solve." Brad Kava, *Teen Arrested for Raping Santa Cruz Woman*, Santa Cruz Patch, May 12, 2011 (santacruz.patch.com/articles/rape-suspect-arrested-by-santa-cruz-police). Because Castillo was still on bail from the original arrest, waiting for a conviction would have allowed him to continue to walk the streets and potentially victimize others.

Also in California, a man was arrested and charged with the 2012 abduction and murder of Sierra LaMar, a 15-year-old girl, and three other crimes based on DNA identification performed at his arrest for a different felony in 2010.[6] The 2010 charge was dismissed when an earlier misdemeanor probation was extended. *Id.* Thus, without DNA identification at arrest, these crimes would never have led to

---

[5] *See* Kimberly White, *DNA Hit Leads Police to Watsonville Man Arrested for Kidnapping and Assaulting Woman*, Santa Cruz Sentinel, May 12, 2011 (www.santacruzsentinel.com/localstories/ci_18054267); Jessica M. Pasko, *Watsonville Man Sentenced to 15 Years in Sexual Assault Case*, Santa Cruz Sentinel, Sept. 24, 2012 (www.santacruzsentinel.com/watsonville/ci_21619379/watsonville-man-sentenced-15-years-sexual-assault-case).

[6] *See* Cal. Dep't of Justice, *Effects of the All Adult Arrestee Provision* (oag.ca.gov/sites/all/files/pdfs/bfs/garcia_torres_sierra_lamar_abduction.pdf); *Sierra LaMar Slaying Suspect Charged In Attempted Kidnappings*, Los Angeles Times, Nov. 14, 2012 (latimesblogs.latimes.com/lanow/2012/11/sierra-lamar-suspect.html).

an arrest and a potential recidivist criminal would still be on the streets.[7]

DNA identification upon arrest not only catches the guilty, but can exonerate the innocent. *See United States* v. *Kincade*, 379 F.3d 813, 839 n.38 (9th Cir. 2004) (en banc) ("use of CODIS promptly clears thousands of potential suspects"—thereby preventing unnecessary intrusions on innocent people and "advancing the overwhelming public interest in prosecuting crimes *accurately*") (citation omitted); *United States* v. *Sczubelek*, 402 F.3d 175, 185 (3d Cir. 2005) ("While the presence of Sczubelek's DNA in CODIS may inculpate him in the future, it may also exonerate him.").

For example, in 1987, Chester Turner was arrested for assault in California, but freed due to lack of evidence. At that time, California law did not require that his DNA profile be taken on arrest. He continued to terrorize a Los Angeles community and was arrested nineteen more times before being convicted of rape in 2002. *See Haskell*, 669 F.3d at 1065. Only then was his DNA profile taken, and it matched evidence found on twelve rape and murder victims, the first murdered only two months after his 1987 arrest. *See* Andrew Blankstein, *et al.*, *DNA*

---

[7] Similar histories in Illinois, Maryland and Colorado have been chronicled, showing how crimes could have been prevented if DNA had been taken from serial rapists and murderers upon an earlier arrest. *See Chicago's Study on Preventable Crimes* (www.dnaresource.com/documents/ChicagoPreventableCrimes-Final.pdf); Maryland Criminal Justice Info. Sys., *Maryland Study on Preventable Crimes* (www.denverda.org/DNA_Documents/MarylandDNAarresteestudy.pdf); Denver DA, *Denver's Study on Preventable Crimes* (www.denverda.org/DNA_Documents/Arrestee_Database/Denver%20Preventable%20Crime%20Study1.pdf).

Analysis Links Inmate to 12 Slayings, L.A. Times, Oct. 23, 2004, at A1; *see also* 151 Cong. Rec. S9528 (July 29, 2005) (Sen. Kyl). Those crimes could have been prevented had Turner's DNA profile been taken upon his initial arrest, rather than only after a conviction. *See Haskell*, 669 F.3d at 1065.

But that story is made even worse by the fact that another man, a mentally disabled janitor named David Jones, was wrongfully convicted of three of Turner's murders based on blood-typing evidence and served eleven years in prison for crimes he did not commit. *Id.* Had Turner's DNA been sampled upon his first arrest, this wrongful conviction likely never would have occurred. *Id. See also* The National Registry of Exonerations, *David Allen Jones* (www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3335). Similarly, in New Mexico an arrestee DNA match under Katie's law both solved the murder of an eleven-year-old girl and exonerated a mentally challenged man who had wrongfully confessed to the crime and was jailed for two years. *See* Scott Sandlin, *Man Confessed To Murder He Didn't Commit*, Albuquerque Journal, Aug. 14, 2010 (www.abqjournal.com/news/metro/1404951metro08-14-10.htm#ixzz2G0C7vkpl).

Such stories of crimes solved and prevented because of arrestee DNA can be multiplied many times over. Virginia, which began arrestee DNA testing in 2003, shows how arrestee profiles can assist in solving and preventing crime. As of October 31, 2012, there were 356,112 profiles in the state database, resulting in 8,344 hits. *See* State of Virginia, Dep't of Forensic Science, *DNA Databank Statistics* (www.dfs.virginia.gov/statistics/index.cfm). These hits assisted 8,190 investigations, including

607 murders and 1,126 sex crimes. *Id.* Of these hits, 785 were obtained from the Arrestee Database, with 117 of those associated with sexual assault cases. *Id.*

In California, DNA identification at felony arrest has had dramatic results, with the number of hits to crime scene evidence more than doubling after the state began testing arrestees rather than just convicted offenders. *See* Cal. Dep't of Justice, *Effects of the All Adult Arrestee Provision* (oag.ca.gov/bfs/prop69/faqs). California's average number of monthly hits between offender DNA profiles and DNA profiles from unsolved crime scene samples increased from 183 per month in 2008 (the year before full implementation of the law requiring collection at arrest) to over 400 per month by July 2011. *Id.* California has solved more crime in the last three years from arrestee DNA database samples than it had in the prior 25 years from use of its various convicted offender DNA databases. *Id.*

Conversely, when collection from arrestees was temporary suspended as a result of the decision of the California Court of Appeal in *People* v. *Buza*, 129 Cal. Rptr. 3d 753 (Cal Ct. App. 2011), *review granted*, 132 Cal. Rptr. 3d 616 (Cal. 2012), California's crime-solving ability dramatically decreased. The California Department of Justice found that diminished DNA sample collection at felony arrest due to the *Buza* decision resulted in about 200 fewer hits per month, until sample collection at booking was restored when the California Supreme Court depublished that decision. *See* Cal. Dep't of Justice, *Impacts of Buza Decision on CAL-DNA Submissions and Hits June 2011-March 2012* (oag.ca.gov/sites/all/files/pdfs/bfs/buza_effects_table.pdf).

The kinds of life-saving successes experienced in Virginia and California can be found in other states where arrestee DNA profiles have expanded databases and aided more investigations. FBI, *CODIS—NDIS Statistics* (www.fbi.gov/about-us/lab/codis/ndis-statistics). This crucial identification technique helps law enforcement keep communities safe, prevent recidivist criminals from claiming new victims, and bring justice and closure to victims. *See Kincade*, 379 F.3d at 839 (convictions based on DNA profiling "help[] bring closure to countless victims of crime who long have languished in the knowledge that perpetrators remain at large"). All these gains, however, would be undone nationwide if the Court affirms the decision below.

Moreover, far from trampling on privacy rights, DNA identification actually *reduces* invasions of privacy as well as inefficient and biased law enforcement. When no DNA match can be made, investigations and prosecutions are often left to the memory of witnesses or the discretion of law enforcement officers and police. DNA, however, is a "silent biological witness at the crime scene." John M. Butler, *Forensic DNA Typing: Biology, Technology, and Genetics of STR Markers DNA Initiative* 2 (2d ed. 2005). A DNA match leads immediately to the right suspect, reducing the need for intrusive investigations of the innocent and eliminating racial profiling or other biases that might otherwise creep into investigations. *See Kincade*, 379 F.3d at 838; *Sczubelek*, 402 F.3d at 185 ("The interest in accurate criminal investigations and prosecutions is a compelling interest that the DNA Act can reasonably be said to advance."). This permits law enforcement to turn its attention to solving other crimes. The use of

DNA to catch serial sexual offenders leads to enormous financial savings. Ray A. Wickenheiser, *The Business Case for Using Forensic DNA Technology to Solve and Prevent Crime*, 7 J. BioLaw & Bus. 34 (2004). By responsibly expanding the database to include arrestee profiles, the savings are even greater.

Simply put, if DNA testing of arrestees is prohibited, innocent people will die who would otherwise live; victims will suffer physical or psychological harm because of criminal acts that could have been prevented by this technology; and innocent people will languish in prison or even be executed for crimes they did not commit. We will never know the exact number, but if even a single life is lost or destroyed because governments cannot employ this simple, non-invasive tool to identify recidivists before they strike again, that is one life too many. Moreover, as this case shows, invalidating DNA identification laws will doubtless lead to the release of other recidivists like Alonzo King identified through arrestee DNA matches, who would then be free to potentially victimize other innocent people. If there were real privacy interests at stake that counterbalanced the overwhelming public benefits, perhaps these dire consequences would have to be tolerated. But as next shown, no such interests exist.

II. DNA IDENTIFICATION IMPLICATES NO PROTECTED PRIVACY INTERESTS OF ARRESTEES.

Because obtaining a saliva sample and analyzing it to create a DNA profile is technically a "search," the question under the Fourth Amendment is whether that search is "reasonable" if conducted without a warrant. The reasonableness of a search involves "assessing, on the one hand, the degree to which it

intrudes upon an individual's privacy, and on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Samson* v. *California*, 547 U.S. 843, 848 (2006). As shown above, the governmental interest in arrestee DNA identification is overwhelming. On the other side of the balance, the procedure intrudes on no protectable privacy interests, because no arrestee has a right to shield his or her identity.

Arrestees have diminished privacy interests as compared to the general population. Based on an officer's determination that there is probable cause to believe they have committed crimes, arrestees are forcibly detained and put in jail. They can lawfully be subjected to numerous other intrusions not faced by the general public. *See, e.g.*, *Bell* v. *Wolfish*, 441 U.S. 520 (1979) (strip searches); *Haskell*, 669 F.3d at 1058 (arrestees may be subjected to body cavity searches; be monitored by guards of the opposite sex while they shower and use the toilet; be restrained and pepper-sprayed; and be subjected to 23-hour lockdowns) (citations omitted).

Most importantly for this case, arrestees have no right to shield their identity. As this Court held in *Illinois* v. *Lafayette*, 462 U.S. 640 (1983), an arrestee's belongings may be subjected to warrantless search in part because "inspection of an arrestee's personal property may assist the police in ascertaining or verifying his identity." *Id.* at 646. Once a suspect is arrested upon probable cause, "his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it." *Jones* v. *Murray*, 962 F.2d 302, 306 (4th Cir. 1992). Arrestees are therefore always required to provide multiple forms of identification—including drivers'

licenses, fingerprints and photographs—regardless of whether their name is already known.

DNA identification is no different. The process of obtaining a sample through a cheek swab "is perhaps the least intrusive of all seizures—it involves no penetration of the skin, pain, or substantial inconvenience." Jules Epstein, *"Genetic Surveillance"—The Bogeyman Response to Familial DNA Investigations*, 2009 U. Ill. J.L. Tech. & Pol'y 141, 152 (2009). And the limited information obtained by analyzing that sample—the thirteen otherwise meaningless chemical markers that are compiled into a DNA profile and placed in the national database—involves no greater intrusion on privacy than fingerprints or other forms of identification.

The DNA profile "is used solely as an accurate, unique, identifying marker—in other words, as fingerprints for the twenty-first century." *United States* v. *Mitchell*, 652 F.3d 387, 410 (3d Cir. 2011) (en banc). But "DNA is a further—and in fact a more reliable—means of identification" than fingerprints. *Sczubelek*, 402 F.3d at 184. *See also Green* v. *Berge*, 354 F.3d 675, 679 (7th Cir. 2004) ("DNA is the most reliable evidence of identification—stronger even than fingerprints or photographs."). Physical and facial appearances can be changed, driver's licenses forged, and fingerprints concealed during crimes. But everyone leaves their DNA everywhere they go, *see* Epstein, *supra*, at 151—including where they have committed crimes that they want to remain undetected.

The court below invalidated Maryland's law based on its conclusion that "King's expectation of privacy is greater than the State's purported interest in using King's DNA to identify him * * *." *King*, 425

Md. at 556. This mistaken holding was premised on a basic conceptual error: the belief that "identifying" a person merely means learning his or her name.[8] In the court's view, the government's legitimate interest in identifying arrestees is limited to knowing their names, and if a name can be discerned through other means, such as traditional fingerprinting, the government has no need to employ DNA identification and the Fourth Amendment prohibits it from doing so. The court reversed respondent's conviction because the State had "no evidence that it had any problems whatsoever identifying accurately King through traditional booking routines." *King*, 425 Md. at 599. He had not "presented false identification when arrested or had altered his fingerprints or appearance in any way that might increase the State's legitimate interest in requiring an additional form of identification to be certain who it had arrested," and the court refused to allow DNA identification "without a showing that accurate identification was not possible using 'traditional' methods." *Id.* at 599, 600.

That reasoning is profoundly flawed. Identification is not just knowing a person's name. "Identity" is simply "'the condition of being the same with something described, claimed, or asserted * * *.'"

---

[8] Other courts have made the same mistake. *See Buza*, 129 Cal. Rptr. 3d at 776 ("The value and primary use of DNA is investigatory; the DNA may be useful for determining who a person is, but this is not the use to which it is put at the time of arrest and it is not necessary for that purpose."); *Mario W.* v. *Kaipio*, 281 P.3d 476, 479 (Ariz. 2012) ("the State does not seek a profile simply to *identify* any juvenile in the normally accepted use of that term" because "it is plain that the legislature intended the profile to be used for purposes other than simply confirming the name of the person charged with the current crime").

Haskell, 669 F.3d at 1063 (quoting Webster's Third New International Dictionary 1123 (2002)). Names, birthdates and other documentary data are one kind of identifying information, but a very imperfect one. It is easy to lie about or conceal one's name or birthdate. Similarly, one can change one's appearance to make an identifying photograph less useful.

Fingerprints provide better information, physically identifying an arrestee as the person with a particular set of unique fingerprints. Thus, the government always takes fingerprints from arrestees even when it already knows their names through other means. But fingerprinting itself does not reveal a person's name. Rather, fingerprints are put into a database that allows law enforcement to legitimately learn whether that identifying information is connected with other records—which may or may not be linked to a name—and thereby solve other crimes and maintain a record against which future samples can be matched. *See Anderson* v. *Commonwealth*, 650 S.E.2d 702, 705 (Va. 2007); *Kincade*, 379 F.3d at 819; *Jones*, 962 F.2d at 306. This process invades no legitimate privacy interests because only identifying information is obtained, which no arrestee ever has a right to conceal, regardless of whether the government already has other such information. *See Mitchell*, 652 F.3d at 411 ("[I]t is 'elementary' that blanket fingerprinting of individuals who have been lawfully arrested or charged with a crime does not run afoul of the Fourth Amendment.") (citation omitted).

DNA identification is no different. *See Haskell*, 669 F.3d at 1063 ("The collection and use of DNA for identification purposes is substantially identical to a law enforcement officer obtaining an arrestee's

fingerprints to determine whether he is implicated in another crime."). A DNA profile identifies someone as the person with a particular unique set of otherwise meaningless DNA markers, just as traditional fingerprinting identifies a person by a particular unique set of lines on his fingers, or photography identifies a person by a particular set of facial characteristics, or production of a driver's license identifies someone as the person with that license information. The DNA markers themselves *are* the person's identity, just as much as a name and birthday or other physical characteristics like facial features and fingerprints. This serves the same purposes as regular fingerprint identification.

The only difference is that DNA identification can often do the job better. "The governmental justification for [DNA] identification * * * relies on no argument different in kind from that traditionally advanced for taking fingerprints and photographs, but with additional force because of the potentially greater precision of DNA sampling and matching methods." *Sczubelek*, 402 F.3d at 185-86 (quoting *Jones*, 962 F.2d at 307). This greater precision in identification was critical to this case: King wore a mask during the rape and there was no fingerprint evidence. But he left his DNA, which could not be concealed. Identifying King as the person with that DNA profile led to an arrest and conviction where fingerprinting would not have.

The Maryland court also erred in holding that, because the government's interest purportedly stops at learning a person's name, law enforcement has no ability to use DNA profiling for "investigative" purposes such as matching it to crime scene evidence. 425 Md. at 601 ("the State may secure the

use of DNA samples, without a warrant under the Act, as a means to identify an arrestee, but not for investigatory purposes").[9]

The matching of a DNA profile against other records is not a separate search, or any search at all.[10] The search has ended once a sample has been analyzed to discern the identifying DNA markers—the only information that law enforcement ever obtains or is lawfully permitted to obtain during DNA identification. Arrestees have no more interest in concealing this identifying information to prevent themselves from being linked to a crime than they have in preventing law enforcement from using their names, birthdates, photographs or fingerprints for "investigative" purposes. No one has a Fourth Amendment right to the privacy of his or her criminal endeavors. *See Rakas* v. *Illinois*, 439 U.S. 128, 143-44 n.12 (1978) ("a 'legitimate' expectation of privacy, by definition, means more than a subjective expectation of not being discovered").

---

[9] *See also Buza*, 129 Cal. Rptr. 3d at 774 ("There can be no doubt that this use of DNA samples is for purposes of criminal investigation rather than simple identification."); *Mario W.*, 281 P.3d at 483 (prohibiting law enforcement from analyzing samples from juvenile suspects to determine DNA profiles unless the suspect absconds).

[10] *See, e.g.*, *Boroian* v. *Mueller*, 616 F.3d 60, 62 (1st Cir. 2010) ("the retention and matching of [a] lawfully obtained [DNA] profile against other profiles in the government database [] does not constitute a search within the meaning of the Fourth Amendment."); *accord Wilson* v. *Collins*, 517 F.3d 421, 428 (6th Cir. 2008); *United States* v. *Amerson*, 483 F.3d 73, 86 (2d Cir. 2007); *Johnson* v. *Quander*, 440 F.3d 489, 498 (D.C. Cir. 2006); *Smith* v. *Indiana*, 744 N.E.2d 437, 440 (Ind. 2001).

Once lawfully obtained, identifying information—whether fingerprints, names, photographs or DNA profiles—can be and is legitimately used to match that information with other information left by the perpetrator at the crime scene in the form of fingerprints or bodily fluids. The crime scene evidence was not the subject of any warrantless search of the suspect, but rather was voluntarily discarded for anyone to find. The fingerprint or DNA profile obtained upon the earlier or later arrest is simply used to identify the arrestee as that perpetrator. The government has a compelling interest in making that identification and thereby protecting the public from criminal activity.

If accepted, the flawed dichotomy between identification and investigative uses of DNA profiles would drastically disrupt law enforcement and endanger public safety. DNA profiles are used for investigatory purposes. But so are fingerprints and other forms of identification. If the reasoning of the court below were correct, "our entire criminal justice system would be upended." *Haskell*, 669 F.3d at 1061. The entire system of fingerprinting would be invalid, because law enforcement could not require an arrestee to submit to fingerprinting if the records were ever to be used to link the person to a crime. *See id.* (if DNA profiles and fingerprint records "may only be used in connection with the crime for which probable cause was found," law enforcement "would be prevented from using basic investigative tools" and "could never be allowed to match crime scene fingerprints to databases of prints collected from past arrestees").

Future victims and their loved ones should not have to suffer and grieve because arrestees want to

hide their identities. Arrestees' illegitimate interest in withholding their identifying information pales in comparison with the vital interests of these countless unknown future victims.

II. THIS CASE SHOULD NOT BE DECIDED BASED ON HYPOTHETICAL SCENARIOS.

DNA identification in Maryland, like other jurisdictions, is strictly limited to determining and cataloguing the thirteen markers that comprise a CODIS DNA profile, which have no diagnostic value.[11] Yet the court below held that an arrestee has an "expectation of privacy to be free from warrantless searches of his biological material and all of the information contained within that material," and that even though only identifying information was obtained from King's sample, "we can not turn a blind eye to the vast genetic treasure map that remains in the DNA sample retained by the State." *King*, 425 Md. at 595-96. It concluded that the fact that "the Maryland DNA Collection Act restricts the *use* of the biological material obtained does not change the nature of the search." *Id.* at 596.

This was error. The only information obtained through King's DNA identification—and all other DNA profiles collected throughout the Nation—is the identifying profile that reveals nothing about physical characteristics. *See Mitchell*, 652 F.3d at 400-01 (thirteen markers "purposely selected" because they

---

[11] Some states may utilize additional non-diagnostic loci in their local DNA identification databases, but only 13 loci are employed in CODIS searches. If the loci used in CODIS are proposed to be expanded, Congress must be notified at least 180 days in advance. *See* Justice for All Act of 2004, Pub. L. 108-405, § 203(f), 118 Stat. 2260.

are not "associated with any known physical or medical characteristics") (quoting *Kincade*, 379 F.3d at 818; H.R. Rep. No. 106-900, pt. 1, at 27). Hypothetical analyses of samples to reveal other information are prohibited by law, have never occurred in this or any other case, and should have no bearing on the Court's decision. Courts decide cases; they do not engage in baseless speculation about possible misuses of DNA by mythical state operatives.[12] Legal decisions in this area should not be based on "dramatic Hollywood fantasies," but rather on "concretely particularized facts developed in the cauldron of the adversary process and reduced to an assessable record." *Kincade*, 379 F.3d at 837-38. If and when "some future program permits the parade of horribles the DNA Act's opponents fear—unregulated disclosure of CODIS profiles to private parties, genetic discrimination, state-sponsored eugenics," there is "every confidence that courts will respond appropriately." *Id.* at 838.

The court below believed that because the legal restrictions on the use of DNA sample *could* be violated in some hypothetical situation, the actual nature of the search at issue has no effect on the Fourth Amendment analysis. *See* 425 Md. at 595 ("upholding the statute simply because of restrictions on use of the material obtained would be analogous to allowing the government to seize private medical records without a warrant, but restrict their use only

---

[12] *See, e.g., Georgia* v. *Randolph*, 547 U.S. 103, 120 n.8 (2006) ("We decide the case before us, not a different one."); *Amalgamated Ass'n of Street, Elec. Railway & Motor Coach Empl. of Am.* v. *Wisc. Empl. Rel. Bd.*, 340 U.S. 383, 406 n.4 (1951) ("our task is to decide the case before us and not to conjure up difficulties that may never arise").

to the portion of the records that serve to identify the patient"). This was incorrect.

There is a presumption that government officials behave lawfully. *See, e.g.*, *Postal Service* v. *Gregory*, 534 U.S. 1, 10 (2001). But even without that presumption, in assessing whether a search violates privacy rights, the only relevant consideration is the actual information obtained in the search. As the Court has noted, "we have never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment." *United States* v. *Karo*, 468 U.S. 705, 712 (1984). Thus, when assessing the reasonableness of urine samples to determine illegal drug use, the Court has noted that "the collection and subsequent chemical analysis of such samples are searches that must meet the reasonableness requirement of the Fourth Amendment." *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 678-79 (1989).

Here, the collection of the DNA sample is plainly reasonable because the bodily intrusion is *de minimis*. The analysis of the sample is similarly reasonable because the only information that ever is, or lawfully can be, learned consists of the thirteen identifying markers. Unlike documentary evidence that can be read and understood on sight, DNA sequences are effectively encrypted in their natural state, and a saliva sample conveys no genetic information at all unless and until it is analyzed.

Should there ever be a future case in which additional information is gleaned from an arrestee's DNA sample—and there is no reason to think one ever will occur—a future court could address the implications at that time. A court could determine, based on the information obtained in that case, how

to balance the constitutional interests of the arrestee and the government. But in *this* case, there is no allegation that any information was ever obtained beyond the thirteen loci used in CODIS.

It is also important to understand just how far-fetched the fantasies about possible misuse of DNA samples really are. CODIS's design and the legal rules governing its operation "reflect the system's function as a tool for law enforcement identification, and do not allow DNA samples or profiles within the scope of the system to be used for unauthorized purposes." 73 Fed. Reg. 74,932, 74,933 (Dec. 10, 2008). The only information stored in CODIS consists of the thirteen non-diagnostic markers, which are not associated with a name. *Kincade*, 379 F.3d at 818-19; H.R. Rep. No. 106-900, pt. 1 at 27. And there are stringent restrictions, in Maryland and elsewhere, that prohibit anyone from obtaining or using any genetic information of an arrestee beyond the identifying markers, under pain of criminal penalty. *See, e.g.*, *See* Md. Code Regs. 29.05.01.06 (2012); 42 U.S.C. §§ 14133(c), 14135e(c) (imprisonment or fines for unauthorized collection or disclosure of samples).

Even if someone successfully tapped into CODIS to search through DNA profiles, that person would still be unable to ascertain any other identifying information. Participating laboratories may not upload case or donor names to CODIS. "CODIS records contain only an identifier for the agency that provided the DNA sample, a specimen identification number, and the name of the personnel associated with the analysis." *Kincade*, 379 F.3d at 819 n.8. Only the originating laboratory can identify an individual by name, and only after there is a hit matching DNA from a crime scene to a DNA profile

in the database. *See* 61 Fed. Reg. 37,495, 37,497 (July 18, 1996) ("Since NDIS records contained in NDIS do not include personal identifiers of the individuals from whom the DNA samples were collected, retrieval by personal identifiers of these record subjects is not possible.").

Thus, a wrongdoer who somehow gained access to CODIS would be unable to learn any genetic information about any specific arrestee unless he or she risked criminal penalties by (1) finding out where that person was arrested; (2) conspiring with the arresting agency to gain access to the physical sample taken at arrest; and (3) surreptitiously performing additional laboratory tests on that sample to generate additional data.

It is entirely unreasonable to think that someone would risk criminal sanctions to carry out such an elaborate plot, which would be revealed as soon as the information were used. If someone truly had a nefarious reason to learn a person's genetic information, it would be far easier to follow the person around, pick up a discarded sample of hair or other material, and test it. There is no apparent reason why anyone would be motivated to obtain such information in the first place. And even though the FBI has been analyzing DNA for over twenty years, "there has never been one noted case in which a lab employee has ever made an unauthorized disclosure of DNA information." 155 Cong. Rec. S12904, S12905 (Dec. 10, 2009) (remarks of Sen. Kyl). Therefore, "[t]he risk that lab employees will undertake such acts is not substantial enough to merit consideration in a reasoned analysis of the privacy risks posed by the operation of NDIS." *Id.*

It is similarly irrelevant whether the government offers released individuals a way to expunge their DNA records, or how easy any such process is. *Cf. King*, 425 Md. at 597 ("The expungement provisions of the Act recognize the importance of a conviction in altering the scope and reasonableness of the expectation of privacy."). Although Maryland offers a relatively simple expungement procedure, that mechanism is immaterial to the constitutionality of DNA identification. Just as there is no constitutional right to expungement of fingerprint records lawfully obtained, there is no constitutional right to expungement of DNA profiles. Once purely identifying information is lawfully obtained, the Constitution does not place further restrictions on the government's legitimate use of that information. The fact that Maryland, by providing an expungement procedure, has been *more* generous to arrestees than the Constitution requires casts no doubt on the validity of the initial collection of identifying information.

CONCLUSION

For the foregoing reasons and those in the petitioner's brief, the judgment below should be reversed.

Respectfully submitted,

JONATHAN S. FRANKLIN*
MARK EMERY
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0466
jfranklin@fulbright.com

* Counsel of Record

Counsel for Amici Curiae

AMICUS CURIAE BRIEF

No. 12-207

IN THE

Supreme Court of the United States

STATE OF MARYLAND,

Petitioner,

v.

ALONZO JAY KING,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF OF *AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF RESPONDENT

JENNIFER LYNCH
Counsel of Record
LEE TIEN
HANNI FAKHOURY
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, California 94110
(415) 436-9333
jlynch@eff.org

Attorneys for Amicus Curiae
Electronic Frontier Foundation

245438

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES iii

BRIEF OF *AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF RESPONDENT 1

STATEMENT OF INTEREST 1

INTRODUCTION 2

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE WARRANTLESS SEIZURE AND REPEATED SEARCH OF DNA TAKEN FROM MERE ARRESTEES IS UNCONSTITUTIONAL 5

A. The Fourth Amendment Prohibits Warrantless and Suspicionless DNA Collection from Arrestees 6

B. The Search at Issue is a Repeated Intrusion into a Person's Sensitive Genetic Information 8

Table of Contents

Page

C. The Privacy Interests Implicated by DNA Collection are Significant and Outweigh the Government's Interest in Investigating Crimes and Building Out DNA Databases 12

1. DNA Contains a Person's Most Private and Personal Information 14

a. The DNA Sample 14

b. The DNA Profile 16

c. Tangible and Intangible Harms . .20

2. Cheaper DNA Analysis Will Lead to More DNA Analysis 24

3. As the Cost of DNA Processing Drops, the Government is Already Taking Steps to Expand Its Collection and Use of DNA 30

CONCLUSION 36

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Arizona v. Gant,
556 U.S. 332 (2009) 5, 6, 12

Ashcroft v. al-Kidd,
131 S. Ct. 2074 (2011) 10

Bell v. Wolfish,
441 U.S. 520 (1979) 6

Boroian v. Mueller,
616 F.3d 60 (1st Cir. 2010) 8

Chimel v. California,
395 U.S. 752 (1969) 6

City of Ontario v. Quon,
130 S. Ct. 2619 (2010) 1

City of Indianapolis v. Edmond,
531 U.S. 32 (2000) 8

Coolidge v. New Hampshire,
403 U.S. 443 (1971) 5

Cupp v. Murphy,
412 U.S. 291 (1973) 10

Ferguson v. City of Charleston,
532 U.S. 67 (2001) 7

Cited Authorities

Page

Florence v. Bd. of Chosen Freeholders of County of Burlington,
132 S. Ct. 1510 (2012) 6

Griffin v. Wisconsin,
483 U.S. 868 (1987) 7

Haskell v. Harris,
669 F.3d 1049 (9th Cir. 2012), *reh'g en banc granted*,
686 F.3d 1121 (9th Cir. 2012) ..... *passim*

Katz v. United States,
389 U.S. 347 (1967) 5

Kyllo v. United States,
533 U.S. 27 (2001) 3, 10, 13

Marron v. United States,
275 U.S. 192 (1927) 11

Maryland v. Garrison,
480 U.S. 79 (1987) 11

National Aeronautics and Space Administration v. Nelson,
131 S. Ct. 746 (2011) 1

Nat'l Treasury Emps. Union v. Von Raab,
489 U.S. 656 (1989) 6

Cited Authorities

Page

New Jersey v. T.L.O.,
469 U.S. 325 (1985) 9

Samson v. California,
547 U.S. 843 (2006) 6, 7

Schmerber v. California,
384 U.S. 757 (1966) 9, 10

Schneckloth v. Bustamonte,
412 U.S. 218 (1973) 5

Skinner v. Ry. Labor Execs.' Ass'n,
489 U.S. 602 (1989) 10

United States v. Comprehensive Drug Testing, Inc.,
621 F.3d 1162 (9th Cir. 2010) (en banc) (per curiam) 11

United States v. Di Re,
332 U.S. 581 (1948) 23

United States v. Jones,
132 S. Ct. 945 (2012) 1, 3, 24

United States v. Kincade,
379 F.3d 813 (9th Cir. 2004) (en banc) ..... *passim*

United States v. Knights,
534 U.S. 112 (2001) 6, 7

Cited Authorities

Page

United States v. Knotts,
460 U.S. 276 (1983) 24

United States v. Kriesel,
508 F.3d 941 (9th Cir. 2007) 10

United States v. Mitchell,
652 F.3d 387 (3d Cir. 2011) ..... *passim*

United States v. Ponce,
Mag. No. 07-00215-DAD (E.D. Cal. 2007),
SW 07-2000-KJM (E.D. Cal. 2007), Mag. No.
07-0199 (C.D. Cal. 2007) 23

United States v. Pool,
621 F.3d 1213 (9th Cir. 2010), *opinion vacated*,
659 F.3d 761 (9th Cir. 2011) 1, 9, 30, 35

United States v. Scott,
450 F.3d 863 (9th Cir. 2005) 7

United States v. Stevens,
130 S. Ct. 1577 (2010) 16

STATE CASES

King v. State,
42 A.3d 549 (Md. 2012) 9, 14, 16

People v. Buza,
197 Cal. App. 4th 1424, Cal. Rptr. 3d 753 (2011),
review granted and opinion superseded, 262 P.3d
854 (Cal. 2011) 1, 8

Cited Authorities

Page

FEDERAL CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV ..... *passim*

FEDERAL REGULATIONS AND RULES

Sup. Ct. R. 37.3(a) 1

Sup. Ct. R. 37.6 1

28 C.F.R. §28.12 32

STATE STATUTES AND LEGISLATIVE MATERIALS

Md. Code Pub. Safety §2-506 ..... 15, 17

Md. Code. Pub. Safety §2-509 15

Md. Code. Pub. Safety §2-511 15

Pub. L. No. 107-314 §1063, 116 Stat. 2653 (2002) 29

LAW REVIEW ARTICLES

Daniel Solove, *"I've Got Nothing to Hide" and Other Misunderstandings of Privacy,"* 44 San Diego L. Rev. 745 (2007) 21

Harold J. Krent, *Of Diaries and Data Banks: Use Restrictions Under the Fourth Amendment*, 74 Tex. L. Rev. 49 (1995) 15

Cited Authorities

Page

Henry T. Greely, *et al.*, *Family Ties: The Use of DNA Offender Databases to Catch Offenders' Kin*, 34 J.L. Med. & Ethics (2006) 18

Natalie Ram, *Fortuity and Forensic Familial Identification*, 63 Stan. L. Rev. 751 (2011).....17

Paul Ohm, *The Fourth Amendment Right to Delete*, 119 Harv. L. Rev. F. 10 (2005).....21

OTHER AUTHORITIES

Annie Sweeny & Frank Main, *Botched DNA Report Falsely Implicates Woman*, Chi. Sun-Times, Nov. 8, 2004.....22

Cal. Bureau of Forensic Servs., *DNA Frequently Asked Questions: Effects of the All Adult Arrestee Provision* 31

Cal. Dep't. of Justice, *Crime in California 2011*.....22

Cal. Dept. of Justice, *CAL-DNA Data Bank Technical Procedures Manual* 27, October 17, 2008.....20

Dan Noyes, *Audit Critical of Santa Clara County Crime Lab, ABC Local Station KGO*, October 21, 2012 35

Cited Authorities

Page

Dep't. of Justice, *Exhibit 300: Capital Asset Plan and Business Case Summary, FBI Combined DNA Index System* 32

Dep't. of Justice, *Exhibit 300: Capital Asset Summary* 32

Ellen Messmer, *Legal Hurdles Threaten to Slow FBI's 'Rapid DNA' Revolution*, Network World, September 19, 2012 3

Emily Ramshaw, *DSHS Turned Over Hundreds of DNA Samples to Feds*, Texas Tribune, February 2, 2010 27

Fed. Bureau of Investigation, *CODIS Brochure* 25

Fed. Bureau of Investigation, *CODIS—NDIS Statistics* 31

Fed. Bureau of Investigation, *CODIS—The Future* 20, 32

Fed. Bureau of Investigation, *Familial Searching* 17

Fed. Bureau of Investigation, *Planned Process and Timeline for Implementation of Additional CODIS Core Loci* 17

Hannah Barnes, *DNA Test Jailed Innocent Man For Murder*, BBC, August 31, 2012 23

Cited Authorities

Page

IntegenX, *White Paper: The Case for Rapid DNA* (May 2012) 34

JASON (The MITRE Corporation), *The $100 Genome: Implications for the DoD* 2 (Dec. 15, 2010) 25, 26

Jennifer Lynch, *DHS Considers Collecting DNA From Kids; DEA and US Marshals Already Do*, Elec. Frontier Found., May 14, 2012.....33

Jennifer Lynch, *Rapid DNA: Coming Soon to a Police Department or Immigration Office Near You*, Elec. Frontier Found., January 6, 2013 ..... 26, 33

John W. Blackledge, *et al.*, *Rapid DNA*, Nat'l Acad. Assoc. Magazine, May-June 2012 34

Joyce Kim, *et al.*, *Policy implications for familial searching*, Investigative Genetics, November 2011 18

Julia Angwin, *FBI Turns Off Thousands of GPS Devices After Supreme Court Ruling*, Wall St. J., February 25, 2012.....24

Julia Angwin, *U.S. Terrorism Agency to Tap a Vast Database of Citizens*, Wall St. J., December 13, 2012 19

Cited Authorities

Page

Mark Motivans, U.S. Dep't of Justice, *Federal Justice Statistics 2009 – Statistical Tables* (Dec. 2011) 22

Mary Miller, *Data theft: Top 5 most expensive data breaches*, Christian Science Monitor, May 4, 2011.....29

Maryland Dept. of Pub. Safety & Corr. Servs., *Keeping Communities Safe* 12

Melissa Gymrek, *et al.*, *Identifying Personal Genomes by Surname Inference*, 339 Science 321 (January 18, 2013) 15, 20, 28

Michelle H. Lewis, *et al.*, *State Laws Regarding the Retention and Use of Residual Newborn Screening Blood Samples*, Pediatrics, March 28, 2011.....27

N. Webster, *An American Dictionary of the English Language* (1828) (reprint 6th ed. 1989)....10

Nat'l Center for Biotech. Info., Nat'l Insts. of Health, *GenBank Overview*.....19

Nat'l Human Genome Research Inst., *Free Online Tutorials Teach Anyone How to Use Genome Databases*, Nat'l Insts. of Health 28

Nat'l Human Genome Research Inst., Nat'l Insts. of Health, *Overview of Genetic Testing* 25

Cited Authorities

Page

Nat'l Inst. of Justice, *DNA Evidence Backlogs: Convicted Offender and Arrestee Samples* 30

National Institute of Justice, *DNA Sample Collection From Arrestees* 2

Press Release, Cal. Dep't of Justice, *Brown Announces Elimination of DNA Data Bank Backlog* (Sept. 10, 2007) 25

Press Release, *FBI Contracts with Unisys for Development and Deployment of Next-Generation Combined DNA Index System*, Business Wire, October 19, 2006 31

Senior Policy Council, Options Paper, *Expanding DNA Testing in the Immigration Process*, U.S. Citizenship and Immigration Servs. 35

Testimony of Jerome Pender, Deputy Assistant Director, Criminal Justice Information Services Division, Federal Bureau of Investigation, July 18, 2012 13

U.S. Citizenship and Immigration Servs., *SPC Opinions Paper: Expanding DNA Testing in the Immigration Process* 34

William C. Thompson, *Tarnish on the "Gold Standard": Understanding Recent Problems in Forensic DNA Testing*, The Champion, Jan./Feb. 2006 22

BRIEF OF *AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST[1]

The Electronic Frontier Foundation ("EFF") is a nonprofit, member-supported civil liberties organization working to protect rights in the information society. EFF actively encourages and challenges government and the courts to support privacy and safeguard individual autonomy as emerging technologies become more prevalent in society. As part of its mission, EFF has often served as counsel or amicus in privacy cases, such as *United States v. Jones*, 132 S. Ct. 945 (2012), *National Aeronautics and Space Administration v. Nelson*, 131 S. Ct. 746 (2011), and *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010). EFF has also served as amicus curiae in several cases before federal and state courts considering the constitutionality of DNA testing of pretrial arrestees. *See Haskell v. Harris*, 669 F.3d 1049 (9th Cir. 2012), *reh'g en banc granted*, 686 F.3d 1121 (9th Cir. 2012); *United States v. Pool*, 621 F.3d 1213 (9th Cir. 2010), *vacated*, 659 F.3d 761 (9th Cir. 2011); *United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011); *People v. Buza*, 262 P.3d 854 (Cal. 2011), *granting review to* 129 Cal.Rptr.3d 753, 197 Cal. App. 4th 1424 (2011).

---

1. Pursuant to Supreme Court Rule 37.3(a), amicus states that petitioner and respondent have filed letters with the Clerk granting blanket consent to the filing of amicus briefs. Pursuant to Supreme Court Rule 37.6, amicus states this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amicus or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION

Our DNA contains our entire genetic makeup—our most private information about who we are, where we come from and who we will be. DNA can be used to identify us in the narrow and proper sense of that word—"who is that?"—but it also tells the world who we are related to, what we look like, and how likely we are to get specific diseases. This Court must protect this sensitive genetic material by prohibiting the warrantless collection of DNA from arrestees.

SUMMARY OF ARGUMENT

The State of Maryland, like 27 other states and the federal government,[2] collects DNA without a warrant from people merely arrested for a crime—people who are presumed innocent and, therefore, not that different from the lawyers arguing this case or the justices deciding it. Maryland and supporting *amici* argue DNA collection is necessary to definitively identify an arrestee, but DNA profiles are not actually used to verify the arrestee's identity because the test cannot be used to verify a person's true identity *at the time of arrest*. Given this and the myriad other quick and effective identification tools already at Maryland's disposal—from fingerprints to palm prints to face recognition-capable photographs—it is clear that the true purpose of DNA collection from arrestees is entirely investigative.

---

2. *See* National Institute of Justice, *DNA Sample Collection From Arrestees*, http://nij.gov/topics/forensics/evidence/dna/collection-from-arrestees.htm (last visited January 30, 2013).

Maryland and *amici* also claim that DNA profiles contain no more data than a fingerprint. But DNA profiling naturally requires the seizure of a DNA sample that contains the arrestee's entire genome. As shown by the trend toward "familial" DNA searching, DNA profiles can tell who a person is related to and may be able to tell, when combined with other publicly available data, whether a person is more or less likely to have a given trait or get a specific disease. The breadth of information obtained by a mere fingerprint is not remotely comparable to that in DNA.

Thus, this Court must once again confront the "power of technology to shrink the realm of guaranteed privacy." *Kyllo v. United States*, 533 U.S. 27, 34 (2001). Technological advancements in the last twenty years have made it easier, cheaper, and faster to collect, process, search through, and analyze DNA and will "make stored DNA only more revealing in time." *United States v. Kincade*, 379 F.3d 813, 842 n.3 (9th Cir. 2004) (en banc) (Gould, J., concurring). Last year, in this Court's pivotal opinion in *United States v. Jones*, 132 S. Ct. 945 (2012), five justices recognized the power of technology to minimize and, in some cases eliminate, practical privacy protections by making mass data collection and surveillance not just possible, but routine. *Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring), 963 (Alito, J., concurring). As in *Jones*, this Court is forced to review searches that were not feasible twenty years ago, much less at the time the Fourth Amendment was drafted. In doing so, this Court must acknowledge the current and future backdrop of the search practices at issue here:

- The government must collect DNA samples to create DNA profiles, so any claim that the search and seizure does not implicate an individual's most private bodily information is false.

- The government retains both DNA profiles and samples almost indefinitely.

- The government repeatedly uses once-collected DNA profiles and samples for purposes unrelated to any one defendant's identity.

- The government has expanded, and will continue to expand, the scope of DNA sample and profile collection, both within and outside of the law enforcement context.

- DNA collection and analysis technology is rapidly advancing, making DNA searches less expensive and more efficient at determining information from an individual sample or profile.

If this Court were to adopt Maryland's arguments—that DNA may be collected without a warrant or individualized suspicion from people presumed innocent—people who are "just like everyone else . . . then it's hard to see how we can keep the database from expanding to include everybody." *Kincade*, 379 F.3d at 872 (Kozinski, J., dissenting). This Court should put an end to the inevitable expansion of warrantless DNA testing.

ARGUMENT

I. THE WARRANTLESS SEIZURE AND REPEATED SEARCH OF DNA TAKEN FROM MERE ARRESTEES IS UNCONSTITUTIONAL

Maryland's laws authorizing blanket DNA collection from individuals not yet convicted of a crime presage a future in which every person's DNA could be sampled and profiled without individualized suspicion.

Laws that give "police officers unbridled discretion to rummage at will among a person's private effects" violate the Fourth Amendment because searches that are not tied to finding evidence of the crime at issue "create[] a serious and recurring threat to the privacy of countless individuals." *Arizona v. Gant*, 556 U.S. 332, 345 (2009). To minimize such discretion, warrantless searches are *per se* unreasonable, subject only to a few "jealously and carefully drawn" exceptions. *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Gant*, 556 U.S. at 338 (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)).

Maryland has failed to show that warrantless DNA collection from arrestees falls within any of these "carefully drawn" exceptions, for three reasons. Maryland (1) relies on inapplicable Fourth Amendment exceptions to justify the search; (2) misinterprets the "intrusiveness" of the actual "search" by focusing on its physical aspects; and (3) ignores the significant and actual privacy interests involved.

A. The Fourth Amendment Prohibits Warrantless and Suspicionless DNA Collection from Arrestees

The Fourth Amendment only allows searches unsupported by individualized suspicion in "certain limited circumstances." *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 668 (1989); *see also Gant*, 556 U.S. at 338. Warrantless searches of arrestees have only been upheld in two, limited circumstances. Under the search incident to arrest exception to the Fourth Amendment, police may search an arrestee's person and the area within his immediate control in order to protect officers from hidden weapons, and prevent the destruction of evidence. *Gant*, 556 U.S. at 339 (citing *Chimel v. California*, 395 U.S. 752, 763 (1969)). Second, warrantless searches of arrestees has been authorized in the non-law enforcement context of prison security. *See Florence v. Bd. of Chosen Freeholders of County of Burlington*, 132 S. Ct. 1510 (2012); *Bell v. Wolfish*, 441 U.S. 520 (1979). Outside of these two circumstances, this Court has never approved of blanket, suspicionless searches of arrestees.

Maryland argues that this Court's decisions in *United States v. Knights*, 534 U.S. 112 (2001) and *Samson v. California*, 547 U.S. 843 (2006), upholding warrantless, suspicionless searches of probationers and parolees respectively, should also apply to searches of arrestees. *See* Brief of Petitioner at 12-13. In *Samson*, the Court upheld a suspicionless search of a parolee after employing a "totality of the circumstances" test "assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental

interests." *Samson*, 547 U.S. at 848 (quoting *Knights*, 534 U.S. at 118-19).

That test is inapplicable here, because mere arrestees are outside the scope of *Samson* and *Knights*. In both cases, this Court recognized that a person's status as a convicted felon is "salient." *Samson*, 547 U.S. at 848 (quoting *Knights*, 534 U.S. at 118). And in *Samson* this Court noted that "[p]robation is 'one point . . . on a continuum of possible punishments [and] [o]n this continuum, parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment." *Samson*, 547 U.S. at 848, 850 (quoting *Knights*, 534 U.S. at 119). Arrestees are not and cannot be on this "continuum." As the Ninth Circuit has noted, "pretrial releasees are not probationers[;]" they "are ordinary people who have been accused of a crime but are presumed innocent." *United States v. Scott*, 450 F.3d 863, 871-872 (9th Cir. 2005) (citing *Ferguson v. City of Charleston*, 532 U.S. 67, 80 n. 15 (2001); *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987)).

Nor do the government interests that supported the suspicionless searches in *Knights* and *Samson* apply to searches of arrestees. In *Knights* and *Samson* the Court ruled that since both probationers and parolees have been *convicted*, the non-law enforcement interests of preventing recidivism and encouraging reintegration into society justify a suspicionless search. *Samson*, 547 at 853-54; *Knights*, 534 U.S. at 120-21. But collecting and searching DNA only serves the government's interest in law enforcement investigation. As one court has noted, "DNA profiles are neither necessary nor helpful for verifying who a person is at the time of arrest. Indeed, the fact that

DNA testing cannot be employed to verify a person's true identity at the time of arrest demonstrates that collection of a DNA sample at this time has another purpose." *People v. Buza*, 197 Cal. App. 4th 1424, 129 Cal. Rptr. 3d 753, 773 (2011), *review granted and opinion superseded*, 262 P.3d 854 (Cal. 2011). Rather, the only true purpose of DNA collection is to "detect evidence of ordinary criminal wrongdoing." *See City of Indianapolis v. Edmond*, 531 U.S. 32, 41, 44 (2000) (holding that a "program whose primary purpose is ultimately indistinguishable from the general interest in crime control" violated the Fourth Amendment). This purpose cannot support an exception to the Fourth Amendment's warrant requirement.

B. The Search at Issue is a Repeated Intrusion into a Person's Sensitive Genetic Information

Petitioner and supporting *amici* view DNA collection as a single, extended Fourth Amendment event, from initial swab to CODIS matching.[3] *See* Amicus Curiae Brief by the Los Angeles County District Attorney on Behalf of Los Angeles County at 9 ("accessing the DNA database is not a 'second search.'"). They then hang their arguments on the initial collection, arguing that its minimal physical discomfort fails to outweigh the state's interest in "identifying" the arrestee. But as the Maryland Court of Appeals and other courts have recognized, there

3. Petitioner, its supporting *amici*, and several cases have explained how DNA collection and processing operates—from collecting the DNA sample, processing that sample to obtain the 13-loci DNA profile, uploading the profile to state and federal level DNA databases, and then using the FBI's CODIS software to search for matches. *See, e.g.*, Petitioner's Brief at 3–4, 15–16; *Mitchell*, 652 F.3d at 399–401; *Boroian v. Mueller*, 616 F.3d 60, 65–66 (1st Cir. 2010).

are "two discrete and separate searches" involved in DNA collection. *King v. State*, 42 A.3d 549, 575 (Md. 2012); *see also United States v. Mitchell*, 652 F.3d 387, 406-7 (3d Cir. 2011) ("The second 'search' at issue is, of course, the processing of the DNA sample and creation of the DNA profile"). The state's analysis excludes any consideration of the arrestee's privacy interests in his DNA sample and profile and any consideration of his family members' privacy interests in their own genetic information.

"The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber v. California*, 384 U.S. 757, 767 (1966). Intrusion is measured not solely by the physical discomfort involved in the initial search but also by the breadth of the government's entrance into what was previously a private sphere. DNA searches involve "intrusion into the widest spectrum of human privacy." *United States v. Pool*, 621 F.3d 1213, 1232 (9th Cir. 2010) (Lucero, J., concurring), *opinion vacated* 659 F.3d 761 (9th Cir. 2011).

By disaggregating the multiple searches and seizures implicated by governmental DNA collection, it becomes clear that the privacy intrusion at issue is not limited to the initial physical extraction but instead stretches far beyond anything "reasonably related in scope to the circumstances which justified the interference in the first place." *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985); *see also Kincade*, 379 F.3d at 873 (Kozinski, J., dissenting) ("it is important to recognize that the Fourth Amendment intrusion here is not primarily the taking of the blood, but seizure of the DNA fingerprint and its inclusion in a searchable database.").

Without question, the State's initial physical intrusion to collect a DNA sample from Mr. King—in this case, the buccal swab—is both a search and a seizure. *See Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616-17 (1989) (breathalyzer and urine sample); *Cupp v. Murphy*, 412 U.S. 291, 295 (1973) (finger nail scrapings); *Schmerber*, 384 U.S. at 767-71 (blood). The extraction of Mr. King's DNA profile from that sample is a second search. *See Skinner*, 489 U.S. at 616 (recognizing that the "ensuing chemical analysis of the sample to obtain physiological data" is also a search). Placing his DNA profile into a state and national database and running the profile through CODIS for "hits" is another search. The same is true of every subsequent use of Mr. King's DNA profile for "matching," or running new DNA profiles against his to find a match. *See Kyllo*, 533 U.S. at 32 n.1 ("search" means "[t]o look over or through for the purpose of finding something; to explore." (quoting N. Webster, *An American Dictionary of the English Language* 66 (1828) (reprint 6th ed.1989)); *see also United States v. Kriesel*, 508 F.3d 941, 956 (9th Cir. 2007) (B. Fletcher, J., dissenting) ("the warrantless 'search' permitted by the 2004 DNA Act extends to repeated searches of his DNA whenever the government has some minimal investigative interest.") (citing *Kincade*, 379 F.3d at 873 (Kozinski, J., dissenting)).

Moreover, the seizure of the DNA sample necessarily requires the seizure of a person's entire genome, raising another set of Fourth Amendment concerns. The Fourth Amendment was intended to prevent "general warrants" which allowed the government "to search and seize whatever and whomever they pleased" without judicial review or individualized suspicion. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011). As a result, this Court has always

insisted that search warrants must "particularly describe the things to be seized" to ensure that when it comes to "what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States*, 275 U.S. 192, 196 (1927); *see also Maryland v. Garrison*, 480 U.S. 79, 84 (1987) (particularity "requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.").

Allowing the wholesale, warrantless seizure of a person's genome eviscerates the concept of particularity; it is in essence a "general search" of a person's genetic history. It is the equivalent of the government seizing and searching an entire computer, rummaging through all of its data— including data outside of the probable cause justification—to find one specific file. *See, e.g. United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1177 (9th Cir. 2010) (en banc) (per curiam) ("that over-seizing is an inherent part of the electronic search process . . . calls for greater vigilance on the part of judicial officers in striking the right balance between the government's interest in law enforcement and the right of individuals to be free from unreasonable searches and seizures."). Regardless of what the government does with the DNA sample and the limits it places on the sample's use, all the highly personal data in it is in the government's possession, and outside the individual's control.

By disaggregating the searches and seizures involved in DNA collection, it is clear that DNA collection serves investigatory rather than identification purposes and strays far beyond the government's stated need. Moreover,

as discussed below, each of these searches and seizures presents its own privacy concerns that far outweigh the government's stated or true purpose in collecting DNA. DNA collection from arrestees is no less a "police entitlement" than the vehicle search at issue in *Gant*, and "it is anathema to the Fourth Amendment to permit a warrantless search on that basis." *Gant*, 556 U.S. at 347.

C. The Privacy Interests Implicated by DNA Collection are Significant and Outweigh the Government's Interest in Investigating Crimes and Building Out DNA Databases

Maryland and its *amici* seek to diminish the privacy interests at stake by cabining them to the initial cheek swab and the thirteen loci currently contained in a DNA profile and then balancing those interests against the government's stated need to "identify" arrestees. However, this discounts the very real privacy interests implicated by the other searches and seizures outlined above. It also ignores the myriad other more effective methods Maryland already has at its disposal—from fingerprints[4] to palm prints[5] to face recognition-capable

---

4. *See* Maryland Dept. of Pub. Safety & Corr. Servs., *Keeping Communities Safe*, http://www.dpscs.state.md.us/initiatives/kcs/index_KCS_tech.shtml (last visited January 30, 2013) (noting that, using Maryland's new automated fingerprint system, "99% of criminal and non-criminal fingerprint submissions can now be matched digitally").

5. *Id.* (noting the new fingerprint system also "gives Maryland law enforcement a new palm search capability never before possible").

photographs[6] to the biographic information all arrestees must provide upon arrest—to identify arrestees.

As this Court explained in *Kyllo* "the rule [a court] adopt[s] must take account of more sophisticated systems that are already in use or in *development*." *Kyllo*, 533 U.S. at 36 (emphasis added); *see also Mitchell*, 652 F.3d at 424 (Rendell, J., dissenting) ("we should not be blind to the potential for abuse when assessing the legitimacy of [DNA collection]"). This Court must address three crucial aspects raised by the expanding use of DNA technology. These include (1) the sheer breadth and depth of information available in DNA, (2) the clear trend toward cheaper and faster DNA analysis, and (3) the increasing expansion of DNA collection and use throughout government and society as a whole. Taken together, these facts show that DNA collection allows the government to learn far more about its citizens than any other law enforcement technology previously addressed by the Court. If the Court does not scrupulously apply Fourth Amendment protections here, the continued evolution of DNA technology will usher in a future where DNA may be collected from any person at any time, entered into and checked against one or many DNA databases, and—as we discard our DNA wherever we go—used to conduct surveillance on a level far beyond anything currently possible with cameras, GPS, cell phone tracking or other such technology.

---

6. *See* Testimony of Jerome Pender, Deputy Assistant Director, Criminal Justice Information Services Division, Federal Bureau of Investigation, July 18, 2012, *available at* http://www.fbi.gov/news/testimony/what-facial-recognition-technology-means-for-privacy-and-civil-liberties (last visited January 30, 2013) (noting that Maryland is one of several states participating in a pilot face-recognition program with the FBI).

1. DNA Contains a Person's Most Private and Personal Information

DNA—whether it is in the form of a full genetic sample or an extracted profile—can reveal an extraordinary amount of private information about a person. The court below recognized the "vast genetic treasure map" contained in the DNA sample collected and retained by the government. *King*, 42 A.3d at 577. Divided opinions from other courts have noted that DNA technology poses grave threats to personal privacy and expressed concerns about how the expansion of DNA collection portends a society in which every American's DNA will be sampled and profiled. *See Kincade*, 379 F.3d at 872 (Kozinski, J., dissenting) ("[i]f collecting DNA fingerprints can be justified [here], then it's hard to see how we can keep the database from expanding to include everybody."); *Mitchell*, 652 F.3d at 424 (Rendell, J., dissenting) ("we believe we should not be blind to the potential for abuse when assessing the legitimacy of government action. These concerns are legitimate and real[.]"). As one judge has noted, "the advance of science promises to make stored DNA only more revealing in time." *Kincade*, 379 F.3d at 842 n.3 (Gould, J., concurring).

a. The DNA Sample

The government cannot extract a DNA profile without first collecting a DNA sample that contains a person's entire genetic makeup—private and intensely personal information that maps, in the broadest sense, who we are, where we come from and who we will be. It can tell us which part of the world our ancestors came from; who we are related to; whether we are likely to get a host

of genetically-determined diseases, and possibly even behavioral tendencies and sexual orientation. *See Kincade*, 379 F.3d at 850 (Reinhardt, J., dissenting) (quoting Harold J. Krent, *Of Diaries and Data Banks: Use Restrictions Under the Fourth Amendment*, 74 Tex. L. Rev. 49, 95-96 (1995) and noting that DNA sample can reveal "genetic defects, predispositions to diseases, and perhaps even sexual orientation").

Maryland, like other states that collect DNA samples, does not delete this genetic data when it creates a profile but instead retains it indefinitely. *See* Md. Code Pub. Safety §2-506(b).[7] The state and its *amici* try to discount the privacy risks inherent in retaining this data by arguing that Maryland's law restricts its use. *See* Petitioner's Brief at p. 15-16; Brief of the United States as Amicus Curiae Supporting Petitioner, at 22.[8] However,

---

7. Maryland does have a process for expunging DNA samples. *See* Md. Code. Pub. Safety §2-511. Automatic expungement occurs only after the initiation of the "criminal action" against the arrestee does not result in a conviction, is reversed or vacated, or the arrestee is granted an unconditional pardon. *Id.* at §2-511(a)(1). In other words, a criminal charge must be filed in order for the sample to be expunged automatically. In all other instances – including those where no charge is ever filed following arrest – the arrestee must take the effort to get the sample expunged. *Id.* at §§2-511(a)(2), (b).

8. Maryland laws already require the Director of the Crime Laboratory to "create a population data base comprised of DNA samples collected under this subtitle." Md. Code. Pub. Safety §2-509. The law requires the samples to be anonymized, but recent research suggests that is not possible. *See* Melissa Gymrek, *et al.*, *Identifying Personal Genomes by Surname Inference*, 339 Science 321, 322 (January 18, 2013).

as the Maryland Court of Appeals noted, "this does not change the nature of the search." *King*, 42 A.3d at 576.[9] It is anathema to the Fourth Amendment to allow an otherwise unconstitutional search and seizure solely because the government promises, for the time being, to avert its eyes to the treasure trove of data it has seized. And this Court has made it clear it "would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010).

b. The DNA Profile

Maryland and its *amici* argue that an arrestee's DNA profile contains no more information than a fingerprint. *See e.g.*, Petitioner's Brief at 19, Amicus Curiae Brief of Los Angeles County at 3-4, Amicus Brief of United States at 9. This analogy fails to recognize several important distinctions between the two—distinctions that judges have recognized make DNA profiles much more privacy invasive than fingerprints. *See Haskell v. Harris*, 669 F.3d 1049, 1079 (9th Cir. 2012) (Fletcher, J., dissenting), *reh'g en banc granted*, 686 F.3d 1121 (9th Cir. 2012) ("Even with today's technology, however, junk DNA reveals more information than a fingerprint.").

First, a fingerprint cannot reveal familial relationships. Yet, these relationships can already be inferred with a high degree of accuracy from the 13 loci the government

---

9. *See also Haskell*, 669 F.3d at 1079 (Fletcher, J., dissenting) ("Defendants claim that California does not currently conduct such familial searches on *arrestee* DNA profiles, but the possibility—even likelihood—that California will begin conducting such searches in the future remains.").

currently collects.[10] Although Maryland has banned familial searches for the time being,[11] four states expressly authorize such searches and use the 13 CODIS loci to conduct them.[12] Although the CODIS software has not yet been optimized for familial searching, the federal government and other jurisdictions can use it to generate partial matches.[13] The FBI is already considering expanding the CODIS core loci,[14] and once it does, familial relationships may be determined conclusively.

Familial searching disproportionately impacts certain groups in society because criminal DNA databases contain far more African American and Latino DNA than that of other ethnic and racial groups. Several researchers have determined that if familial searching is conducted on a mass scale, as much as 17% of the African American

---

10. *See* Fed. Bureau of Investigation, *Familial Searching*, https://www.fbi.gov/about-us/lab/biometric-analysis/codis/familial-searching (last visited January 30, 2013).

11. Md. Code Pub. Safety §2-506(d).

12. *See, supra*, Fed. Bureau of Investigation, *Familial Searching*. These states include Colorado, California, Texas and Virginia.

13. *See generally*, Natalie Ram, *Fortuity and Forensic Familial Identification*, 63 Stan. L. Rev. 751 (2011) (discussing various jurisdictions' approaches to partial matching and familial searching and differentiating between fortuitous and deliberate searching).

14. *See* Fed. Bureau of Investigation, *Planned Process and Timeline for Implementation of Additional CODIS Core Loci*, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/planned-process-and-timeline-for-implementation-of-additional-codis-core-loci (last visited January 30, 2013).

population in the United States (as opposed to only 4% of the Caucasian population) may be identified through the DNA samples already included in CODIS.[15] No parallel risk exists through mass fingerprint collection and search.

Data aggregation—the ability to combine CODIS profile data with other publicly available genetic data—adds in additional privacy risks. Currently, tens of thousands of humans have had their genomes completely sequenced and over a million have had high-resolution scans for genetic variants. And these numbers are increasing rapidly as the costs of sequencing decline. This means that a substantial, and ever growing, fraction of the population has a fourth degree or closer relative whose genetic information is available in public or private databases.

Although the alleles that make up a CODIS profile are non-coding and likely non-functional, they are linked[16] to specific functional regions within our DNA—regions that include genetic variants that influence phenotypic traits or predispose a person to specific diseases. By combining CODIS information with publicly available genetic data—whether from one of the many online genetic genealogy databases or from a source such as

---

15. Joyce Kim, *et al.*, *Policy implications for familial searching*, Investigative Genetics, November 2011, http://www.investigativegenetics.com/content/2/1/22 (citing Henry T. Greely, *et al.*, *Family Ties: The Use of DNA Offender Databases to Catch Offenders' Kin*, 34 J.L. Med. & Ethics 248, 262 (2006)) (last visited January 30, 2013).

16. "Linked" in the genetic sense, meaning co-inherited with high probability.

the National Institutes of Health's GenBank[17] —it will be possible to infer, for example, a person's propensity for a particular trait or disease strictly from his CODIS profile. A person with access to a CODIS profile and information about the profile owner's relatives (whether inferred from the CODIS profile or from other biographical or genetic data) would, if any near relatives had full genome data in databases, be able to infer aspects of the profile owner's genetic makeup, including any disease-causing variant that lies in the third of the human genome co-inherited (roughly within 50 million base pairs) of a CODIS marker.

That the government would engage in this kind of data aggregation and data mining is utterly predictable. Several federal agencies have centers devoted to analyzing publicly available data to look for trends and specific threats.[18] And researchers have recently engaged in similar data aggregation to re-identify anonymized genetic samples—determining not just the name of the

---

17. Nat'l Center for Biotech. Info., Nat'l Insts. of Health, *GenBank Overview*, http://www.ncbi.nlm.nih.gov/genbank/ (last visited January 30, 2013).

18. For example, new guidelines announced last year by the Office of the Director of National Intelligence allow the National Counterterrorism Center (NCTC) to obtain information from any government database, combine it with other publicly available data to conduct "pattern-based queries and analyses," and then share any of the original or resulting data with federal, state, local or tribal law enforcement, and also with foreign entities and individuals or entities not part of the government. *See* Julia Angwin, *U.S. Terrorism Agency to Tap a Vast Database of Citizens*, Wall St. J., December 13, 2012, *available at* http://online.wsj.com/article/SB10001424127887324478304578171623040640006.html (last visited January 30, 2013).

person who submitted the sample in the first place but also his entire family—"in total . . . breach[ing] the privacy of nearly 50 individuals" from three original samples.[19] Those researchers concluded, "[t]his study shows that data release, even of a few markers, from one person can spread through deep genealogical ties and lead to the identification of another person who might have no acquaintance with the person who released his genetic data." *Id.* Although DNA profiles do not currently contain Y chromosome information, which the researchers used for re-identification, California re-tests offender DNA samples for Y-STR type once a familial search of its database identifies a partial match.[20]

These risks will only increase as more and more genetic data becomes available, as more research is conducted on that genetic data, and as the number of alleles included in a CODIS profile increases.

c. Tangible and Intangible Harms

Government storage, use, and analysis of data after information has been collected create their own threats

---

19. Gymrek, *Identifying Personal Genomes by Surname Inference*, *supra* note 8 at 322.

20. Cal. Dept. of Justice, *CAL-DNA Data Bank Technical Procedures Manual* 27, October 17, 2008, *available at* http://www.aclunc.org/news/press_releases/asset_upload_file490_8577 (last visited January 30, 2013). The FBI is exploring including Y STR and mitochondrial DNA (to determine patrilineal and matrilineal relationships, respectively) in CODIS in the future. *See* Fed. Bureau of Investigation, *CODIS—The Future*, https://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis_future (last visited January 30, 2013).

to privacy and civil liberties. As privacy scholar Daniel Solove has noted, government collection and use of personal information—even personal information that is

> not particularly sensitive ... affect the power relationships between people and the institutions of the modern state. They not only frustrate the individual by creating a sense of helplessness and powerlessness, but they also affect social structure by altering the kind of relationships people have with the institutions that make important decisions about their lives."

Daniel Solove, *"I've Got Nothing to Hide" and Other Misunderstandings of Privacy*, 44 San Diego L. Rev. 745, 756-57 (2007). Government seizure of DNA also results in an individual's inability to control the dissemination of her sensitive, private data. *See e.g.*, Paul Ohm, *The Fourth Amendment Right to Delete*, 119 Harv. L. Rev. F. 10 (2005) (arguing that since "seizure" is about dispossession, an individual loses ability to delete information when the government has a copy of it).

The plaintiffs represented in *Haskell v. Harris*, a Ninth Circuit case that has been stayed pending the outcome of this case, show that almost anyone can be affected by warrantless DNA collection. Each had his or her DNA collected upon arrest. *Haskell*, 669 F.3d at 1066 (Fletcher, J., dissenting). Several were political activists and were arrested during demonstrations. *Id.* None of the plaintiffs was ever convicted of any charges, and in fact, after their DNA samples were taken, police dropped or

dismissed the charges against each of them. *Id.* Against two of the plaintiffs, no charges were ever filed. *Id.*[21]

As the plaintiffs in *Haskell* told the court, when the government collects DNA upon arrest without reason to believe the DNA is linked to a past crime, it is nothing more than an "intimidation tactic" that leaves a person afraid her DNA will falsely be matched to a sample obtained at a crime scene. *Haskell*, 669 F.3d at 1066 (Fletcher, J., dissenting). This is especially true when the arrest occurs in the context of a political demonstration. As Ms. Haskell told the court, this directly impacts an activist's "freedom of expression." *Id.*

Warrantless DNA collection can also lead to concrete harms because it increases risks from sloppy policing and systemic DNA lab problems.[22] In the U.K., David Butler was falsely accused of murder and spent eight months in jail solely because his DNA was in a database and was

---

21. This is typical in California, where the plaintiffs were arrested and where a third of the 300,000 people arrested for felonies each year are never convicted. Many arrestees are never even charged. Cal. Dep't. of Justice, *Crime in California 2011* 49, *available at* http://oag.ca.gov/sites/all/files/pdfs/cjsc/publications/candd/cd11/cd11.pdf (last visited January 30, 2013). Federal arrest and conviction rates follow a similar pattern. Mark Motivans, U.S. Dep't of Justice, *Federal Justice Statistics 2009 – Statistical Tables* 4, 18 (Dec. 2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs09st.pdf (last visited January 30, 2013).

22. *See, e.g.*, William C. Thompson, *Tarnish on the "Gold Standard": Understanding Recent Problems in Forensic DNA Testing*, The Champion, Jan./Feb. 2006 at 10-12 (listing scandals); Annie Sweeny & Frank Main, *Botched DNA Report Falsely Implicates Woman*, Chi. Sun-Times, Nov. 8, 2004.

matched to DNA found on the murder victim despite the existence of other evidence clearly establishing he was nowhere near the victim when the murder occurred.[23] In Sacramento, California, Shawn Ponce was falsely arrested based on DNA and held in jail for five days for two bank robberies in Southern California that he could not have committed.[24] These risks would not have occurred if the defendants' DNA had not been in a database. As this Court noted long ago, "the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment." *United States v. Di Re*, 332 U.S. 581, 595 (1948).

Comparing DNA to fingerprints fails to recognize the essence of DNA collection and search. The intrusiveness of a fingerprint is limited to cataloging the pattern of loops and whorls on a person's finger. It cannot reveal the breadth and depth of information available to the state through DNA collection; nor can it lead to the tangible and intangible harms associated with DNA collection.

---

23. *See* Hannah Barnes, *DNA Test Jailed Innocent Man For Murder*, BBC, August 31, 2012, *available at* http://www.bbc.co.uk/news/science-environment-19412819 (last visited January 30, 2013).

24. *See United States v. Ponce*, Mag. No. 07-00215-DAD (E.D. Cal. 2007), SW 07-2000-KJM (E.D. Cal. 2007), Mag. No. 07-0199 (C.D. Cal. 2007).

2. Cheaper DNA Analysis Will Lead to More DNA Analysis

As technology improves, activities once deemed impossible become not just possible but cheap and efficient to conduct on a mass scale. With surveillance, however, cheapness and efficiency are not an unalloyed good; improved surveillance techniques pose serious privacy risks.

The Court recognized this last year in *Jones* when it found that 28 days of continuous and warrantless GPS surveillance of a car violated the Fourth Amendment. Before *Jones*, this Court could say that individuals had no reasonable expectation of privacy in public, secure in the fact that surveilling individuals was so costly and impractical that it occurred only for short periods of time when the government had a compelling reason to do so. *See e.g., United States v. Knotts*, 460 U.S. 276, 281 (1983) ("A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements."); *Jones*, 132 S. Ct. at 963 (Alito, J., concurring in the judgment and noting that in the "pre-computer age," "[t]raditional surveillance for any extended period of time was difficult and costly and therefore rarely undertaken."). As *Jones* itself and the FBI's actions after *Jones* demonstrate, GPS technology now makes such surveillance not just easier, but cheap and routine. *See Jones*, 132 S. Ct. at 948-49.[25]

---

25. *See* Julia Angwin, *FBI Turns Off Thousands of GPS Devices After Supreme Court Ruling*, Wall St. J., February 25, 2012, *available at* http://blogs.wsj.com/digits/2012/02/25/fbi-turns-off-thousands-of-gps-devices-after-supreme-court-ruling/ (last visited January 30, 2013) (noting that, according to FBI

Society faces the same set of issues for DNA technology. Twenty years ago, when several states and the FBI began maintaining DNA indexes for law enforcement purposes,[26] the cost of analyzing DNA was so great it did not factor into the lives of ordinary Americans.[27] This cannot be said today. The National Human Genome Research Institute at the National Institutes of Health notes "in a few years, the sequencing of a patient's entire genome will be an affordable standard diagnostic tool used in health care."[28] And a report prepared for the U.S. Department of Defense in 2010 predicted the cost to sequence an entire human genome would drop to $100 by

---

General Counsel Andrew Weissmann, "the court ruling prompted the FBI to turn off about 3,000 GPS tracking devices that were in use").

26. *See, e.g.*, Fed. Bureau of Investigation, *CODIS Brochure*, *available at* http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis_brochure (last visited January 30, 2013) (FBI's National DNA system established in 1994); Press Release, Cal. Dep't of Justice, *Brown Announces Elimination of DNA Data Bank Backlog* (Sept. 10, 2007), *available at* http://oag.ca.gov/news/press-releases/brown-announces-elimination-dna-data-bank-backlog (last visited January 30, 2013) (California established DNA database in 1990).

27. *See* JASON (The MITRE Corporation), *The $100 Genome: Implications for the DoD* 2 (Dec. 15, 2010), *available at* www.fas.org/irp/agency/dod/jason/hundred.pdf (last visited January 30, 2013) (noting that the first attempts to sequence the human genome—a project started in 1990 and not completed until 2003—cost approximately $300 million).

28. Nat'l Human Genome Research Inst., Nat'l Insts. of Health, *Overview of Genetic Testing*, https://www.genome.gov/10002335 (last visited January 30, 2013).

this year.[29] The report concluded that "third-generation" sequencing technology would mean that "DNA sequencing costs will no longer be a factor limiting personal human genomics technologies."[30]

The cost of processing DNA samples to obtain a DNA profile has also dropped dramatically. Records released by the Department of Homeland Security under the Freedom of Information Act show that the federal government has invested "substantial funds" to develop Rapid DNA Analyzers—machines about the same size as a laser printer that can extract a DNA profile in 90 minutes or less.[31] These machines can be used by non-scientists outside a lab and can process DNA for as little as $100 per sample.[32]

These profound cost decreases have made it easier—and in some cases routine—to collect, process and store genetic material in areas outside the law enforcement context. For example, the military mandates DNA collection from all members of the armed services.[33] Companies sell personal DNA testing kits to determine

---

29. *See generally The $100 Genome*, *supra* note 27.

30. *Id.* at 2.

31. *See* Jennifer Lynch, *Rapid DNA: Coming Soon to a Police Department or Immigration Office Near You*, Elec. Frontier Found., January 6, 2013, https://www.eff.org/deeplinks/2012/12/rapid-dna-analysis (last visited January 30, 2013). The Department of Homeland Security records are available at https://www.eff.org/file/36203#page/2/mode/1up (last visited January 30, 2013).

32. *Id.*

33. *See generally* Amicus Brief of Los Angeles County at 20.

health and ancestry information for as little as $99.[34] And state newborn genetic screening programs require blood collection from nearly all infants born in the United States.[35]

The reduced costs involved in DNA processing and advances in technology have also made it easier for companies and research institutions to make genetic data publicly available to anyone interested in searching

---

34. *See, e.g.*, 23andMe, https://www.23andme.com/(last visited January 30, 2013) (offering genetic tests for $99); Ancestry.com, http://dna.ancestry.com/offers/buyKit.aspx (last visited January 30, 2013) (offering genetic tests and access to "more than $10 billion international records" for $249); National Geographic, http://shop.nationalgeographic.com/ngs/product/genographic-kits/geno-2.0---genographic-project-participation-and-dna-ancestry-kit (last visited January 30, 2013) (testing "nearly 150,000 DNA markers that have been specifically selected to provide unprecedented ancestry-related information" for $199.95).

35. Newborn genetic screening is mandatory in 49 states, and almost all of the 4 million infants born in the United States each year are tested. *See* Michelle H. Lewis, *et al.*, *State Laws Regarding the Retention and Use of Residual Newborn Screening Blood Samples*, Pediatrics, March 28, 2011, at 704. Despite the important public health reasons for collecting and testing newborn blood, the programs have not been without controversy. *See* Emily Ramshaw, *DSHS Turned Over Hundreds of DNA Samples to Feds*, Texas Tribune, February 2, 2010, *available at* http://www.texastribune.org/texas-state-agencies/department-of-state-health-services/dshs-turned-over-hundreds-of-dna-samples-to-feds/# (last visited January 30, 2013) (noting that blood spots were turned over to "an Armed Forces lab to build a national and, someday, international mitochondrial DNA (mtDNA) registry" for forensic purposes).

it,[36] whether to discover information about their own ancestry,[37] to learn the identity of a biological parent,[38] or to conduct research on previously sequenced DNA to look for new insight on genetically-determined traits and heritable diseases.[39] Yet as these resources become more robust and more accessible, it also becomes much easier and much less costly to combine data from multiple databases and use it for purposes other than that for which it was originally intended.[40]

---

36. *See* Nat'l Human Genome Research Inst., *Free Online Tutorials Teach Anyone How to Use Genome Databases*, Nat'l Insts. of Health, http://www.genome.gov/27530225 (last visited January 30, 2013).

37. *See, e.g.*, Ysearch, http://www.ysearch.org (last visited January 30, 2013) (a free service offered by Family Tree DNA that allows a visitor to search his or her Y chromosome database by surname, genetic markers, and haplogroup); Sorensen Molecular Genealogy Foundation, http://www.smgf.org/pages/sorensondatabase.jspx (last visited January 30, 2013) (another free service that allows users to search their Y chromosome and mitochondrial DNA databases, which include "more than 100,000 DNA samples and family trees from men and women around the world.").

38. *See, e.g.*, Family Finder, http://www.familytreedna.com/landing/family-finder.aspx (last visited Jan. 30, 2013) (a service offered by Family Tree DNA that matches autosomal DNA with a DNA database to find biological relatives).

39. *See, e.g.*, Human Genome Resources, http://www.ncbi.nlm.nih.gov/projects/genome/guide/human/ (last visited January 30, 2013) (a free database of genetic information for biomedical researchers); UCSC Genome Bioinformatics Site, http://genome.ucsc.edu/ (last visited January 30, 2013) (another free database of genomic information with associated research tools).

40. *See* Gymrek, *Identifying Personal Genomes by Surname Inference*, *supra* note 8 at 321-324.

While some rules have been set up to regulate the collection, sharing and use of these DNA samples, the edges of these rules are hazy and changing.[41] And it has been shown in other sensitive data collection contexts that there is a high risk these treasure troves of data will be compromised or used for purposes beyond their original intention.[42]

Courts did not think about the privacy expectation in DNA when the cells we shed revealed nothing about us. That is no longer true. And just as we cannot hide our faces in public or enjoy many conveniences of everyday life without leaving electronic footprints, we cannot hide our DNA; we leave skin cells wherever we go. Therefore, the only possible way to limit government DNA-based surveillance will be to legally constrain governmental collection and use of our DNA.

---

41. In 2002, the National Defense Authorization Act for Fiscal Year 2003 authorized the military to use a database of DNA, collected from service members for the purposes of identifying those killed in combat, for criminal investigations. Pub. L. No. 107-314 §1063, 116 Stat. 2653 (2002).

42. For example, in 2006 the Department of Veterans Affairs lost the names, birth dates, and Social Security numbers of 17.5 million military veterans and personnel. *See* Mary Miller, *Data theft: Top 5 most expensive data breaches*, Christian Science Monitor, May 4, 2011, *available at* http://www.csmonitor.com/Business/2011/0504/Data-theft-Top-5-most-expensive-data-breaches/5.-US-Veterans-Affairs-25-30-million (last visited January 30, 2013).

3. As the Cost of DNA Processing Drops, the Government is Already Taking Steps to Expand Its Collection and Use of DNA

Several judges have warned of the "slippery slope toward ever-expanding warrantless DNA testing." *Pool*, 621 F.3d at 1235 (Schroeder, J., dissenting) (citing *Kincade*, 379 F.3d at 842-71 (Reinhardt, J., dissenting) and 871-75 (Kozinski, J., dissenting)), *opinion vacated* 659 F.3d 761; *see also Mitchell*, 652 F.3d at 429 (Rendell, J., dissenting) ("we may be opening the door to the collection and analysis of DNA for crime-solving purposes from" others with reduced expectations of privacy like students). Those dissents were prescient. Federal, state and local collection, sharing and analysis of DNA profiles and other biometric identifiers have increased significantly over the last several years, and, as Rapid DNA makes DNA processing cheaper, easier and more widely available, it will become possible for even the smallest local police department to create and maintain its own DNA database.

As DNA laws across the country have expanded to cover more crimes and more people, DNA collection has increased dramatically. New samples processed annually through CODIS increased from 1 million in 2007, to approximately 1.3 million in 2008, to nearly 1.7 million samples in 2009, the year Maryland collected Mr. King's DNA.[43] As of December 2012, the National DNA Index

---

43. *See* Nat'l Inst. of Justice, *DNA Evidence Backlogs: Convicted Offender and Arrestee Samples*, http://www.nij.gov/topics/forensics/lab-operations/evidence-backlogs/convicted-offender-arrestee-samples.htm (last visited January 30, 2013) (noting "This increase is a direct reflection of new state statutes increasing the number of offenses that qualify for collection as well as the trend of collecting samples from arrestees.").

("NDIS," the federal level of CODIS) contained nearly 11.5 million non-forensic profiles.[44] And as a result of arrestee collection laws, states' individual databases are each expanding exponentially as well.[45]

Interest in the potential uses for DNA has also increased. States and the federal government are spending millions of dollars to expand DNA collection capabilities. For example, in 2006, the federal Department of Justice awarded a multi-year, multi-million-dollar contract to Unisys to develop a "Next Generation CODIS," which would expand the "scalability and flexibility" of CODIS and include a "highly sophisticated search engine technology that will greatly accelerate the DNA matching process."[46] Since then, the Department of Justice has been rolling out improvements to CODIS that have included enhanced search and analysis capabilities, such as incremental searching, population statistical calculations, efficient processing of large databases up to 50 million

---

44. *See* Fed. Bureau of Investigation, *CODIS—NDIS Statistics*, http://www.fbi.gov/about-us/lab/codis/ndis-statistics (last visited January 30, 2013).

45. *See, e.g.*, Cal. Bureau of Forensic Servs., *DNA Frequently Asked Questions: Effects of the All Adult Arrestee Provision*, http://oag.ca.gov/bfs/prop69/faqs (last visited January 30, 2013) (noting that after California's arrestee DNA collection law was passed in 2009, "the average DNA sample submission rate increased to about 26,500 per month, or about a 120% increase over the average in 2008 of about 12,000 per month).

46. *See* Press Release, *FBI Contracts with Unisys for Development and Deployment of Next-Generation Combined DNA Index System*, Business Wire, October 19, 2006, http://www.businesswire.com/news/home/20061019005514/en/FBI-Contracts-Unisys-Development-Deployment-Next-Generation-Combined (last visited) January 30, 2013).

specimens, and greater interoperability with state and international DNA databases.[47]

This report and the FBI's own website also state that the DOJ will introduce further improvements to CODIS in the near future, including "expanding CODIS capabilities in terms of DNA match technologies (*e.g.*, electropherogram, base composition, full mtDNA sequence, mini-STRs, SNPs)" and kinship searches.[48]

Other branches of the federal government may now collect and process DNA, even from people outside the criminal justice system. Changes to Department of Justice regulations in 2009 require the government to collect DNA "from non-United States persons who are detained under the authority of the United States," whether or not they are implicated in any criminal wrongdoing. 28 C.F.R. §28.12(b). These changes allow agencies like the

---

47. *See* Dep't. of Justice, *Exhibit 300: Capital Asset Summary* 2 (last revised Aug. 1, 2012), *available at* https://my.itdashboard.gov/investment/exhibit300/pdf/011-000002501 (last visited January 30, 2013). For further information on CODIS-related expenditures, *see also* Dep't. of Justice, *Exhibit 300: Capital Asset Plan and Business Case Summary, FBI Combined DNA Index System* 1, February 1, 2010, *available* at http://www.justice.gov/jmd/2011justification/exhibit300/fbi-2011-cjis-wan.pdf (last visited January 30, 2013).

48. *Id.*; *see also* Fed. Bureau of Investigation, *CODIS—The Future*, *available* at http://www.fbi.gov/about-us/lab/codis/codis_future (last visited January 30, 2013) (noting the re-architecture of CODIS will allow it "to include additional DNA technologies" such as Y-chromosome Short Tandem Repeats (Y-STRs) and mitochondrial DNA, both of which can definitively determine kinship along paternal and maternal lineages, respectively).

Department of Homeland Security ("DHS"), Customs and Border Protection, and Immigration and Customs Enforcement to collect DNA from almost any non-US person they fingerprint, including children as young as 14.[49] DHS itself has estimated that as many as 1 million people who are subject to administrative detention or arrest annually could now be subject to DNA collection.[50]

Other public documents show that U.S. Citizenship and Immigrations Services ("USCIS"), a component of DHS, wants to use Rapid DNA analysis to verify refugee applications and for other purposes.[51] USCIS has stated that DNA should be collected from all immigration applicants—possibly even infants—and stored in the FBI's criminal DNA database.[52] The agency also supports sharing immigrant DNA with "local, state, tribal, international, and other federal partners" including the

---

49. *See* Jennifer Lynch, *DHS Considers Collecting DNA From Kids; DEA and US Marshals Already Do*, Elec. Frontier Found., May 14, 2012, https://www.eff.org/deeplinks/2012/04/dhs-considers-collecting-dna-kids-dea-and-us-marshals-already-do (last visited January 30, 2013) (reporting on and linking to records released through the Freedom of Information Act). DHS has also considered revising its fingerprint rules to allow fingerprint collection from children younger than 14. *Id.* This would, in turn, lower DHS's allowable age for DNA collection.

50. *Id.*

51. *See* Jennifer Lynch, *Rapid DNA: Coming Soon to a Police Department or Immigration Office Near You*, Elec. Frontier Found., Jan. 6, 2013, https://www.eff.org/deeplinks/2012/12/rapid-dna-analysis (last visited January 30, 2013) (reporting on and linking to documents).

52. *Id.*

Department of Defense and Interpol.[53] And these same documents show that the intelligence community and the military are interested in using Rapid DNA to reveal ethnicity, health status, age, and other factors.[54]

Although current federal laws and regulations would need to change before USCIS, DHS and the FBI could rely on DNA processed with Rapid DNA machines,[55] state and local law enforcement agencies across the country could begin using these tools immediately. Rapid DNA manufacturers like IntegenX know this and are encouraging agencies to create their own local DNA databases instead of relying on CODIS.[56] Based on these sales materials, it is not hard to imagine local DNA databases quickly proliferating throughout the 18,000 large and small law enforcement agencies around the country. Given the current state of flux for DNA collection

---

53. *Id.*

54. *Id.* The records are available at https://www.eff.org/file/36189#page/9/mode/1up (last visited January 30, 2013).

55. *See* U.S. Citizenship and Immigration Servs., *SPC Opinions Paper: Expanding DNA Testing in the Immigration Process* 1, *available at* https://www.eff.org/file/36189#page/93/mode/1up (last visited January 30, 2013); Ellen Messmer, *Legal Hurdles Threaten to Slow FBI's 'Rapid DNA' Revolution*, Network World, September 19, 2012 *available at* https://www.networkworld.com/news/2012/091912-fbi-rapid-dna-262596.html (January 30, 2013).

56. *See* IntegenX, *White Paper: The Case for Rapid DNA* (May 2012), *available at* http://integenx.com/wp-content/uploads/2012/05/The-Case-for-Rapid-DNA.pdf (last visited January 30, 2013); John W. Blackledge, *et al.*, *Rapid DNA*, Nat'l Acad. Assoc. Magazine, May-June 2012, at 14.

laws, it is unclear what standards would govern the use and prevent the abuse of these tools. Reducing the cost of DNA processing and making it easy enough for the officer on the street to accomplish with minimal training may mean that law enforcement does not follow the stringent DNA handling procedures currently required by the FBI[57] and that, without oversight, collection procedures could become attenuated from an actual arrest and possibly based on little or no real suspicion of criminal activity.

As shown, the "slippery slope toward ever-expanding warrantless DNA testing" judges throughout the country have predicted is already upon us. *See Pool*, 621 F.3d at 1235 (Schroeder, J., dissenting) (citing *Kincade*, 379 F.3d at 842-71 (Reinhardt, J., dissenting) and 871-75 (Kozinski, J., dissenting)); *see also Mitchell*, 652 F.3d at 429 (Rendell, J., dissenting).

---

57. Even the FBI's procedures have not prevented misconduct in labs. *See* Dan Noyes, *Audit Critical of Santa Clara County Crime Lab, ABC Local Station KGO*, October 21, 2012, *available at* http://abclocal.go.com/kgo/story?section=news/iteam&id=8856509 (last visited January 30, 2013) (discussing September 2012 Department of Justice audit of Santa Clara County, California's DNA lab). And as other USCIS public documents note, according to the Department of State, security and chain of custody of DNA samples have had problems in the past. *See* Email from Marcela C. Moglia to Jennifer B. Higgins and Rhonda J. Roberts, July 21, 2009, 2:41 p.m., *available at* https://www.eff.org/file/36189#page/10/mode/1up (last visited January 30, 2013). Even "accredited labs are rife with problems." *See* Senior Policy Council, Options Paper, *Expanding DNA Testing in the Immigration Process*, U.S. Citizenship and Immigration Servs., *available at* https://www.eff.org/file/36189#page/94/mode/1up (last visited January 30, 2013).

CONCLUSION

Warrantless and suspicionless DNA collection from arrestees is the next step toward a future where "all Americans will be at risk . . . of having our DNA samples permanently placed on file in federal cyberspace, and perhaps even worse, of being subjected to various other governmental programs providing for suspicionless searches conducted for law enforcement purposes." *Kincade*, 379 F.3d at 843 (Reinhardt, J., dissenting). This is not merely a "parade of horribles," *Haskell*, 669 F.3d at 1062, but the road we are on. The Maryland Court of Appeals rightly stopped this trajectory. Its decision should be affirmed.

Dated: February 1, 2012

Respectfully submitted,

JENNIFER LYNCH
Counsel of Record
LEE TIEN
HANNI FAKHOURY
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, California 94110
(415) 436-9333
jlynch@eff.org

Attorneys for Amicus Curiae
Electronic Frontier Foundation

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-207

IN THE

Supreme Court of the United States

STATE OF MARYLAND,

Petitioner,

v.

ALONZO JAY KING, JR.,

Respondents.

**On Writ of Certiorari to
The Court of Appeals of Maryland**

BRIEF OF *AMICI CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER AND TWENTY-SIX TECHNICAL EXPERTS AND LEGAL SCHOLARS IN SUPPORT OF RESPONDENT

MARC ROTENBERG
Counsel of Record
ALAN BUTLER
DAVID BRODY
ELECTRONIC PRIVACY
INFORMATION CENTER (EPIC)
1718 Connecticut Ave. NW
Suite 200
Washington, DC 20009
(202) 483-1140
amicus@epic.org

February 1, 2013

TABLE OF CONTENTS

TABLE OF CONTENTS I

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 5

ARGUMENT 6

I. CODIS Has Grown Dramatically and Unpredictably Over Time 6

A. The Dramatic Expansion of CODIS was Unanticipated and Unplanned 7

B. The Expansion of CODIS has Continued Without Necessary Legal Safeguards 10

II. CODIS Profiles Contain Sensitive Personal Information 13

A. Noncoding DNA is Not "Junk DNA" 14

B. The Thirteen CODIS Loci Can Identify an Individual's Race, Ethnicity, and Heritage 18

C. Government DNA Profiles Enable Familial Searches and Result in the Identification of Family Members 20

III. Law Enforcement Collects and Indefinitely Retains Entire DNA Samples, Not Just CODIS Profiles 24

A. Maryland, the Federal Government, and Thirty-Seven Other States Require the Indefinite Retention of Complete DNA Samples 27

B. Retention of Complete DNA Samples is an Unnecessary and Broad Invasion of Genetic Privacy 31

C. Federal and State Statutory Provisions are Insufficient to Safeguard

DNA Samples and Individuals' Genetic Privacy 33
IV. The Federal Bioethics Commission Recommends Limiting Nonconsensual Law Enforcement Access to Biospecimens 35
CONCLUSION 38

TABLE OF AUTHORITIES

CASES

Arizona v. Evans, 514 U.S. 1 (1995) 34
Berger v. New York, 388 U.S. 41 (1967)..... 34
Haskell v. Harris, 669 F.3d 1049 (2012)..... 31
Kohler v. Englade, 470 F.3d 1104 (5th Cir. 2006).... 11
NASA v. Nelson, 131 S. Ct. 746 (2011)..... 35
State v. Emerson, 2012 Ohio 5047 (2012)..... 31
Whalen v. Roe, 429 U.S. 589, 605 (1977) 33

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV. 34

FEDERAL STATUTES

42 U.S.C. § 14132(d) (2012)..... 29
42 U.S.C. § 14135e (2012) 34
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 811(a)(2), 110 Stat. 1214. 8
DNA Analysis Backlog Elimination Act, Pub. L. No. 106-546, 114 Stat. 2726 (2000) 8
DNA Identification Act, Pub. L. No. 103-322, 108 Stat. 2065 7
Genetic Information Nondiscrimination Act of 2008, Pub. L. 110-233, 122 Stat. 861 (2008)..... 14
Violence Against Women Act, Pub. L. No. 109-162 § 1004, 119 Stat. 3086 (2005). 9

STATE STATUTES

44 Pa. Cons. Stat. § 2313 (2012) 28
44 Pa. Cons. Stat. § 2319 (2010) 23

44 Pa. Cons. Stat. § 2319 (2012) 12
44 Pa. Cons. Stat. § 2321 (2012) 30
730 Ill. Comp. Stat. 5 / 5-4-3 (f-1) (2012) 30
730 Ill. Comp. Stat. 5 / 5-4-3 (h) (2012) 28
Ala. Code § 36-18-22 (2012)..... 28
Ala. Code § 36-18-26 (201 30
Ala. Code 975 § 36-18-20 (2012)..... 12, 13
Alaska Stat. § 44.41.035 (2012) 28
Alaska Stat. § 44.41.035(i) (2012)..... 30
Ariz. Rev. Stat. Ann. § 13-610 (2012) 28, 31
Ark. Code Ann. § 12-12-1019 (2012) 28, 30
Ark. Code. Ann. § 12-12-1018 (2012) 12
Cal. Penal Code § 295.1 (West 2012) 28
Cal. Penal Code § 299 (West 2012) 30
Colo. Rev. Stat. § 16-23-104 (2012)..... 28
Colo. Rev. Stat. § 16-23-105 (2012)..... 30
Conn. Gen. Stat. § 54-102 (2012) 30
Conn. Gen. Stat. § 54-102i (2012) 28
Del. Code Ann. tit. 29, § 4713 (2012) 28
Del. Code Ann. tit. 29, § 4713(i) (2012)..... 30
Fla. Stat. § 943.325 (2012) 28
Fla. Stat. § 943.325(16) (2012) 30
Ga. Code Ann. § 35-3-162 (2012)..... 28
Ga. Code Ann. § 35-3-165 (2012)..... 30
Haw. Rev. Stat. § 844D-23 (2012)..... 28
Haw. Rev. Stat. § 844D-71 (2012)..... 30
Idaho Code Ann. § 19-5505 (2012) 28
Idaho Code Ann. § 19-5513 (2012) 30

Ind. Code § 10-13-6-18 (2012) 30
Ind. Code § 10-13-6-9.5 (2012) 28
Iowa Code § 81.3 (2012)..... 12
Iowa Code § 81.4 (2013)..... 28
Iowa Code § 81.9 (2013)..... 30
Kan. Stat. Ann. § 21-2511 (2012)..... 28, 30
Ky. Rev. Stat. Ann. § 17.175 (West 2012) 28
Ky. Rev. Stat. Ann. § 17.175(5) (West 2012)..... 30
La. Rev. Stat. Ann. § 15:606 (2012) 28
La. Rev. Stat. Ann. § 15:612 (2012) 12
La. Rev. Stat. Ann. § 15:614 (2012) 30
Mass. Gen Laws. ch. 22E. § 10 (2012) 12, 13
Mass. Gen. Laws ch. 22E § 15 (2012) 30
Mass. Gen. Laws ch. 22E § 6 (2012) 28
Md. Code Ann., Pub. Safety § 2-505 (2012)..... 13
Md. Code Ann., Pub. Safety § 2-506 (West 2012)..... 27
Md. Code Ann., Pub. Safety § 2-506(d) (2010) 23
Md. Code Ann., Pub. Safety § 2-511 (2012)..... 30
Md. Code Ann., Pub. Safety § 2-512 (2012)..... 34
Me. Rev. Stat. Ann. tit., 25 § 1577 (2012) 12
Me. Rev. Stat. tit. 25, § 1576 (2012) 28, 30
Me. Rev. Stat. tit. 25, § 1577(4) (2012)..... 30
Mich. Comp. Laws § 28.176 (2012) 12, 13
Mich. Comp. Laws. § 28.176 (2012)..... 28, 30, 31
Minn. Stat. § 299C.105(3) (2012)..... 30
Minn. Stat. § 299C.155 (2012) 28
Miss. Code Ann. § 45-33-37 (2012)..... 28, 31
Mo. Rev. Stat. § 650.052 (2012) 12

Mo. Rev. Stat. § 650.055(a) (2012) 30
Mo. Rev. Stat. §§ 650.050-060 (2012) 28
Mont. Code Ann. § 44-6-102 (2012) 12
Mont. Code Ann. § 44-6-103 (2012) 28
Mont. Code Ann. § 44-6-107 (2012) 30
N.C. Gen. Stat. § 15A-266.3 (2012) 28
N.C. Gen. Stat. § 15A-266.3A (2012) 30
N.C. Gen. Stat. § 15A-266.8 (2012) 12
N.D. Cent. Code § 31-13-05 (2012) 28
N.H. Rev. Stat. Ann. § 651-C:2 (2012) 28
N.H. Rev. Stat. Ann. § 651-C:5 (2012) 30
N.J. Stat. Ann. § 53:1-20.21 (West 2012) 28
N.J. Stat. Ann. § 53:1-20.24 (2012) 12
N.J. Stat. Ann. § 53:1-20.25 (West 2012) 30
N.M. Stat. § 29-16-8 (2012) 12
N.M. Stat. Ann. § 29-16-10 (2012) 30
N.M. Stat. Ann. § 29-16-4 (2012) 28
N.Y. Crim. Proc. Law § 995-C (McKinney 2012)..... 28
N.Y. Crim. Proc. Law § 995-C(9) (McKinney 2012) 30
Neb. Rev. Stat. § 29-4105 (2012)..... 12, 13
Neb. Rev. Stat. § 29-4105(4) (2012) 28
Neb. Rev. Stat. § 29-4109 (2012)..... 30
Nev. Rev. Stat. § 176.0912 (2012) 28, 31
Ohio Rev. Code Ann. § 109.573 (LexisNexis 2012) 28
Okla. Admin. Code § 375:30-9-2 (2012) 30
Okla. Stat. tit. 74, § 150.27a (2012) 28

Or. Rev. Stat. § 181.085(1)(e) (2012) 28
Or. Rev. Stat. § 181.085(8)(a) (2012) 30
R.I. Gen. Laws § 12-1.5-13 (2012) 30
R.I. Gen. Laws § 12-1.5-5 (2012) 28
S.C. Code Ann. § 23-3-640 (2012) 12, 13, 28
S.C. Code Ann. § 23-3-660 (2012) 30
Tenn. Code Ann. § 38-6-113 (2012) 28
Tenn. Code Ann. § 40-35-321 (2012) 30
Tex. Gov't Code Ann. § 411.142 (West 2012) 28
Tex. Gov't Code Ann. § 411.151 (West 2012) 30
Utah Code Ann. § 53-10-40(6) (2012) 30
Utah Code Ann. § 53-10-406 (2012) 28
Va. Code Ann. § 19.2-310.4 (2012) 28
Va. Code Ann. § 19.2-310.7 (2012) 30
Vt. Stat. Ann. tit. 20, § 1938 (2012) 28
Vt. Stat. Ann. tit. 20, § 1940 (2012) 30
W. Va. Code § 15-2B-11 (2012) 30
W. Va. Code § 15-2B-8 (2012) 28
Wash. Rev. Code § 43.43.754(4) (2012) 28
Wis. Stat. § 165.77 (2012) 28
Wis. Stat. § 165.77(4) (2012) 30
Wyo. Stat. Ann. § 7-19-402 (2012) 28
Wyo. Stat. Ann. § 7-19-405 (2012) 30

REGULATIONS

73 Fed. Reg. 74,932, 74,935 (Dec. 10, 2008) 10, 11
Wash. Admin. Code § 446.75.070 (2012) 31

LEGISLATIVE MATERIALS

Cong. Rec. S11122 (daily ed. Oct. 5, 2005) (statement of Sen. Patrick Leahy) 10

H.R. Rep. No. 106-900, pt. 1 (2000) 8

Reauthorization of the Violence Against Women Act: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2005) 10

U.S. Dep't of Homeland Sec., *Under Secretary Tara O'Toole, Science and Technology Directorate, Before the House Committee on Appropriates, Subcommittee on Homeland Security, "S&T Fiscal Year 2012 Budget Request"* (Mar. 30, 2011) 12

Violent Offender DNA Identification Act of 1999, DNA Backlog Elimination Act and Convicted Offender DNA Index System Support Act: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary, 106th Cong. 113-115 (2000) (statement of David G. Boyd, Director, Office of Sci. and Tech., Nat'l Inst. of Justice, U.S. Dept. of Justice, Washington, DC) 9

OTHER AUTHORITIES

ACLU, Press Release, *Amendment Attached to the Violence Against Women Act Would Invade the Privacy of Innocent Americans by Collecting and Storing their DNA* (Sept. 29, 2005) 10

Agencywide Message to All NASA Employees: Breach of Personally Identifiable Information (PII), SpaceRef (Nov. 13, 2012) 35

Anita LaFrance Allen, *Genetic Testing, Nature, and Trust*, 27 Seton Hall L. Rev. 887 (1997) 5, 14

Austl. Law Reform Comm'n, *Essentially Yours: The Protection of Human Genetic Information in Australia* (2003) 20

B. A. Malyarchuk, M. Wozniak, *et al.*, *Variation of 15 Autosomal Microsatellite DNA Loci in the Russian Population*, 41 Molecular Biology 1 (2007) 19

Biological and Envtl. Research Info. Sys. (BERIS), Genome Program, U.S. Dep't of Energy, *Human Genome Project Information: DNA Forensics* (2009) 14, 15, 16, 20, 29, 32

Christopher G. Beevers, et al., *Association of the Serotonin Transporter Gene Promoter Region (5-HTTLPR) Polymorphism with Biased Attention for Emotional Stimuli*, 118 J. Abnormal Psychol. 431 (2009) 26

Colo. Bureau of Investigation, *DNA Familial Search Policy* (Oct. 22, 2009) 23

Ctrs. for Disease Control and Prevention, *Genomic Testing* (May 3, 2011) 26

Dante Ciccheti, et. al., *Interaction of Child Maltreatment and 5-HTT Polymorphisms: Suicidal Ideation Among Children from low-SES Backgrounds*, 35 J. Pediatr. Psychol. 536 (2010) 26

DNA Technology in Forensic Science, Comm. on DNA Tech. in Forensic Sci. of the Nat'l Acad. of Sci. (1992) 31, 32

Donald E. Shelton, *Forensic Science in Court* (2011) 22

Elisa Piere & Mairi Levitt, *Risky Individuals and the Politics of Genetic Research Into Aggressiveness and Violence*, 22 Bioethics 457 (2008) 27

Elizabeth E. Joh, *Reclaiming 'Abandoned' DNA: The Fourth Amendment and Genetic Privacy*, 100 NW. U. L. Rev. 857 (2006) 25

Emily C. Barbour, Cong. Research Serv., No. R41847, *DNA Databanking: Selected Fourth Amendment Issues and Analysis* (June 6, 2011) 22

Eric Fischer, Cong. Research Serv., RL 303694, *DNA Evidence: Legislative Initiatives of the 106th Congress* (2001) 7, 8, 9

Erin E. Murphy, Relative *Doubt: Familial Searches of DNA Databases*, 109 Mich. L. Rev. 291 (2010) 21

Fed. Bureau of Investigation, *CODIS – The Future* 18

Gene H. Brody, et. al., *Using Genetically Informed, Randomized Prevention Trials to Test Etiological Hypotheses about Child and Adolescent Drug Use and Psychopathology*, Am. J. of Pub. Health (forthcoming 2013) 33

Grimes E.A., Noake P.J., Dixon L, et al., *Sequence Polyrphism in the Human Melanocortin 1 Receptor Gene as an Indicator of the Red Hair Phenotype*, 122 Forensic Sci. Int'l 124 (2001) 17

Harrison Wein, *How Junk DNA Affects Heart Disease*, NIH Research Matters (Mar. 1 2010) 16, 17

IBM, *Pioneering Genetic Privacy* 14

Interim Plan for the Release of Information In the Event of a "Partial Match" at NDIS, CODIS Bulletin (July 20, 2006) 23

Jessica D. Gabel, *Probable Cause From Probable Bonds: A Genetic Tattle Tale Based on Familial DNA*, 21 Hastings Women's L.J. 3 (2010) 23

Jill S. Barnholtz-Sloan, Ranajit Chakraborty, et al., *Examining Population Stratification via Individual Ancestry Estimates versus Self-Reported Race*, 14 Cancer Epidemiology Biomarkers and Prevention 1545 (2005) 19

John D. H. Stead, Jerome Buard, *et al.*, *Influence of Allele Lineage on the Role of the Insulin Minisatellite in Susceptibility to Type 1 Diabetes*, 9 Hum. Molecular Genetics 2929 (2000) 17

Laboratory Services, Fed. Bureau of Investigation, *CODIS: Combined DNA Index* System (2010) 6

Laboratory Services, Fed. Bureau of Investigation, *CODIS-NDIS Statistics*, FBI (Dec. 2012) 7

Laboratory Services, Fed. Bureau of Investigation, *Familial Searching* (2011) 21

Laboratory Services, Fed. Bureau of Investigation, *Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System* 22

Laboratory Services, Fed. Bureau of Investigation, *Quality Assurance Standards for DNA Databasing Laboratories* 25, 28

Matthew Graydon, François Cholette, et al., *Inferring Ethnicity Using 15 Autosomal STR Loci—Comparisons Among Populations of Similar and Distinctly Different Physical Traits*, 3 Forensic Sci. Int'l: Genetics 251 (2009) 19

NASA KSC Internal Memo: NASA KSC Laptop Theft, SpaceRef (March 20, 2012) 35

Nat'l Human Genome Research Inst., Nat'l Insts. Of Health, *New Findings Challenge Established Views on Human Genome* (June 2007) 15

Nat'l Insts. of Health, *DNA Terrain Affects Function in Human Genome*, NIH Research Matters (Mar. 23, 2009) 18

Privacy and Progress in Whole Genome Sequencing, Pres. Comm'n for the Study of Bioethical Issues (Oct. 2012) 36, 37

Ronald Simons, et. al., *Differential Susceptibility to Context: A Promising Model of the Interplay of Genes and the Social Environment*, 29 Biosociology and Neurosociology: Advances in Group Processes 139 (Kalkhoff, et. al. ed. 2012) 32

S. & Marper v. United Kingdom, App. No. 30562/04 (Eur. Ct. H.R. Dec. 4, 2008). 20

S.P. Myers, et al., *Searching for First-degree Familial Relationships in California's Offender DNA Database: Validation of a Likelihood Ratio-based Approach*, 5 Forensic Sci. Int'l: Genet. 493 (2010) 21

Sci. Working Grp. on DNA Analysis Methods Ad Hoc Committee on Partial Matches, Laboratory Services, Fed. Bureau of Investigation, *SWGDAM Recommendations to the FBI Director on the "Interim Plan for the Release of Information in the Event of a 'Partial Match' at NDIS,"* 11 Forensic Sci. Comm. (Oct. 2009) 24

Sheldon Krimsky & Tania Simoncelli, *Genetic Justice* (2011) 13, 14, 16, 17, 25

The ENCODE Project Consortium, Nat'l Insts. of Health, *Identification and Analysis of Functional Elements in 1% of the Human Genome by the ENCODE Pilot Project*, 447 Nature 799 (2007) 15

U.S. Dep't of Homeland Sec., *Teleconference on Biological Relationship Testing: Opportunities and Challenges* (Oct. 30, 2008) 12

Xing-bo Song, Yi Zhou, et al., *Short-tandem Repeat Analysis in Seven Chinese Regional Populations*, 33 Genetics and Molecular Biology 605 (2010) 18

INTEREST OF THE *AMICI CURIAE*

The Electronic Privacy Information Center (EPIC)[1] is a public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values.

EPIC has participated as *amicus curiae* before this Court and other courts in cases concerning privacy issues, new technologies, and Constitutional interests. *See, e.g., United States v. Jones*, 132 S. Ct. 945 (2012); *Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011); NASA v. Nelson, 131 S. Ct. 746 (2011), Doe v. Reed, 130 S. Ct. 2811 (2010); Quon v. City of Ontario, 130 S. Ct. 2619 (2010); Herring v. United States, 129 S. Ct. 695 (2009); Hiibel v. Sixth Judicial Dist. Ct. of Nevada, Humboldt County*, 547 U.S. 177 (2004); *Smith v. Doe*, 538 U.S. 84 (2003); *Reno v. Condon*, 528 U.S. 141 (2000).

EPIC has a particular interest in matters involving searches and seizures of DNA samples, and maintains an extensive web page on this topic. EPIC, *Genetic Privacy*.[2] EPIC has also sought to limit

---

[1] Letters of consent have not been lodged with the Clerk of the Court because on November 27, 2012, Respondent lodged with the Court their "consent to the filing of amicus curiae briefs, in support of either party or of neither party," and on December 4, 2012, Petitioner lodged with the Court their "consent to the filing of amicus curiae briefs, in support of either party or of neither party." In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

[2] http://epic.org/privacy/genetic/.

unreasonable governmental collection of personal genetic material. *See, e.g., United States v. Pool*, 659 F.3d 761 (9th Cir. 2010); *Kohler v. Englade*, 470 F.3d 1104 (5th Cir. 2006); *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004), *cert. denied* 544 U.S. 924 (2005).

EPIC is particularly concerned about the continued expansion of DNA collection for criminal justice purposes. The CODIS database, which once included the DNA profiles of only convicted sex offenders now contains more than eleven million profiles. Furthermore, access to CODIS is not strictly limited, as all law enforcement agencies in the country, at the federal, state, and local levels, have access for purposes of DNA matching. As CODIS expands, individual privacy rights are implicated, and not just for the individuals whose DNA is collected; the ability to search for partial matches also implicates the privacy rights of family members whose DNA is a close enough match that the person is flagged in a CODIS DNA search.

EPIC is acutely concerned the way new scientific discoveries can further impact privacy rights. Given that there is no statutory requirement for the government to discard the full DNA sample from which the DNA profile is obtained, the government indefinitely remains in possession of a person's full genetic makeup. As science reveals new ways in which DNA may be used, the potential for misuse by government entities presents a risk to individual privacy. Already, state governments have authorized law enforcement DNA samples to be used for non-law enforcement purposes

EPIC is joined in this *amicus* brief by members of its Advisory Board, leading experts in law, technology, and privacy.

Technical Experts and Legal Scholars

James Bamford, Author and Journalist

Grayson Barber, Esq., Grayson Barber, LLC

Colin J. Bennett, Professor, University of Victoria

Francesca Bignami, Professor, George Washington University School of Law

Dr. danah boyd, Senior Researcher, Microsoft Research

Julie E. Cohen, Professor of Law, Georgetown University Law Center

Simon Davies, Project Director, London School of Economics

Laura K. Donohue, Associate Professor of Law, Georgetown University Law Center

David Farber, Distinguished Career Professor of Computer Science and Public Policy, School of Computer Science, Carnegie Mellon University

Dr. Addison Fischer, Former Owner, RSA Data Security, Co-Founder, Verisign

Hon. David H. Flaherty, Professor Emeritus of History and Law, University of Western Ontario; Information Privacy Commissioner for British Columbia, 1993-99

Philip S. Friedman, Friedman Law Offices, PLLC

Deborah Hurley, Chair, EPIC Board of Directors

Jeff Jonas, Founder and Chief Scientist, Systems Research & Development

Jerry Kang, Professor of Law, UCLA School of Law

Chris Larsen, CEO, Ripple

Mary Minow, Library Law Consultant

Pablo Molina, Adjunct Professor, Georgetown University

Dr. Peter G. Neumann, SRI International

Helen Nissenbaum, Professor, Media, Culture & Communication, NYU

Ray Ozzie, (former) Chief Software Architect, Microsoft

Frank A. Pasquale, Schering-Plough Professor in Health Care Regulation and Enforcement, Seton Hall Law School

Dr. Deborah Peel, M.D., Founder and Chair, Patient Privacy Rights

Chip Pitts, Lecturer, Stanford Law School and Oxford University

Bruce Schneier, Security Technologist; Author, Schneier on Security (2008)

Edward G. Viltz, www.InternetCC.org

(Affiliations are for identification only)

SUMMARY OF THE ARGUMENT

The collection of a DNA sample from an individual raises a profound and far-reaching privacy concern. Genetic traits can identify family members and reveal predispositions to disease and mental illness. DNA is a robust descriptor of an individual's entire physiological identity. DNA testing can also result in "social stigma, discrimination in employment, barriers to health insurance, and other problems."[3] As the Combined DNA Indexing System (CODIS) system has expanded, so too has the collection of this particularly sensitive personal information. Even after analyzing the sample to extract a CODIS profile, the government does not destroy it. Maryland, the Federal Government, and the majority of other States indefinitely retain entire DNA samples after CODIS analysis is complete.

Further, the dramatic expansion of CODIS underscores the likelihood that an increasing number of individuals will be subject to the collection of their DNA sample and its maintenance within the criminal justice system. The Presidential Commission for the Study of Bioethics recently warned about the collection of whole genome sequence data by law enforcement agencies and urged the adoption of a consistent floor of privacy protection.

The Fourth Amendment establishes the essential safeguard that limits the otherwise unbounded collection and use of the individual's DNA sample by government.

---

[3] Anita LaFrance Allen, *Genetic Testing, Nature, and Trust*, 27 Seton Hall L. Rev. 887 (1997).

ARGUMENT

This case addresses the privacy interest of an arrestee subjected to warrantless, suspicionless DNA collection and analysis by law enforcement. This privacy interest is substantial. The routine CODIS profiling of arrestees is an unreasonable search and seizure under the Fourth Amendment. The collection and retention of DNA samples also constitutes an unreasonable search and seizure under the Fourth Amendment because it poses unnecessary and ongoing risks to privacy without serving any legitimate government interest.

I. CODIS Has Grown Dramatically and Unpredictably Over Time

In 2000, CODIS contained 441,181 offender profiles. Laboratory Services, Fed. Bureau of Investigation, *CODIS: Combined DNA Index* System 4 (2010).[4] As of December 2012, CODIS contains 11,419,100 offender and arrestee profiles. Laboratory Services, Fed. Bureau of Investigation, *CODIS-NDIS Statistics* (Dec. 2012).[5] The history of CODIS illustrates how the collection of genetic information has grown far beyond its narrow, targeted purpose and currently lacks a constitutionally necessary limiting principle.

---

[4] *Available at* https://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-brochure-2010.

[5] https://www.fbi.gov/about-us/lab/biometric-analysis/codis/ndis-statistics.

A. The Dramatic Expansion of CODIS was Unanticipated and Unplanned

CODIS began in 1994 as an effort to catalogue DNA profiles from crime scenes and compare them to profiles of convicted sex offenders. However, over time the government has continuously and incrementally broadened CODIS' reach, allowing law enforcement to collect and retain DNA samples from many new categories of individuals. When a program like CODIS develops in this statutory step-by-step fashion, it is difficult to divine a limiting principle.

In 1994, Congress passed the DNA Identification Act, which authorized the FBI to create the CODIS database. Pub. L. No. 103-322, 108 Stat. 2065. The Act was meant to "help state and local governments develop and improve their ability to analyze DNA evidence." Eric Fischer, Cong. Research Serv., RL 303694, *DNA Evidence: Legislative Initiatives of the 106th Congress* 2 (2001).[6] Initially, CODIS included only DNA profiles from state convicts "because the language of the 1994 act only authorized the creation of the CODIS system, and not the taking of samples from persons convicted of Federal crimes." H.R. Rep. No. 106-900, pt. 1, at 8 (2000).[7] The Act "did not specify the crimes covered and did not specifically authorize *collection* of DNA from convicted persons." Fischer at 2 (emphasis in original).

Congress later expanded CODIS to include profiles of individuals convicted of Federal crimes in

---

[6] *Available at* http://assets.opencrs.com/rpts/RL30694_20010126.pdf.

[7] *Available at* http://www.gpo.gov/fdsys/pkg/CRPT-106hrpt900/pdf/CRPT-106hrpt900-pt1.pdf.

the Antiterrorism and Effective Death Penalty Act of 1996. Pub. L. No. 104-132, § 811(a)(2), 110 Stat. 1214. However, Congress refrained, at this point, from granting the FBI authority to collect DNA samples from federal offenders. H.R. Rep. No. 106-900, pt. 1, at 9.

In 1997, Congress asked the FBI to develop an implementation plan for federal collection of DNA samples from sex offenders. *Id.* In 1998, the FBI's report requested that Congress grant the agency statutory authority to collect DNA from persons convicted of "crimes of violence, robbery, and burglary." *Id.*

At the FBI's request, in 2000 Congress passed the DNA Analysis Backlog Elimination Act. Pub. L. No. 106-546, 114 Stat. 2726. The Act authorized the collection of DNA from felons and parolees convicted of a narrow subset of federal crimes. *Id.* at § 3(a). The enumerated offenses included murder, sex crimes, kidnapping, and burglary. *Id.* at § 3(d). When Congress debated the law, it was concerned with two main issues: what offenses should qualify a convict for inclusion in CODIS, and whether federal law enforcement agencies should have authority to collect DNA samples. Fischer at 7-10. At the time, congressional researchers recognized that "unlike fingerprints, a DNA sample. . . contains a person's entire genetic code, and much of that code will be identical in close blood relatives." *Id.* at 8.

The FBI objected to allowing DNA collection for only specific enumerated offenses. The Justice Department testified they preferred that "the pertinent categories would be specified in FBI regulations without pre-set [statutory] limitations." *Violent Offender DNA Identification Act of 1999, DNA*

Backlog Elimination Act and Convicted Offender DNA Index System Support Act: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary, 106th Cong. 113-115 (2000) (statement of David G. Boyd, Director, Office of Sci. and Tech., Nat'l Inst. of Justice, U.S. Dept. of Justice, Washington, DC).[8] The Justice Department represented that they would focus primarily on sex offenders and violent felons, but would then consider expanding their scope to other offenses. *Id.* The Justice Department expressed disappointment that some proposed versions of the legislation would omit collection from juvenile delinquents. *Id.* Ultimately, Congress chose to impose limits on DNA collection instead of deferring to the FBI.

In 2005, Congress amended the statute and expanded DNA collection to federal arrestees in a rider to the reauthorization of the Violence Against Women Act. Pub. L. No. 109-162 § 1004, 119 Stat. 3086 (2005). The provision received little public debate or Congressional consideration. No one discussed CODIS or arrestee DNA collection at a hearing on the Act. *See Reauthorization of the Violence Against Women Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005).[9] Rather, the provisions were added as an amendment to the reauthorization bill by a voice vote during a Senate committee mark-up. ACLU, Press Release, *Amendment Attached to the Violence Against Women Act Would Invade the Privacy of Innocent Americans*

---

[8] *Available at* http://commdocs.house.gov/committees/judiciary/hju65302.000/hju65302_0.HTM#115.

[9] *Available at* http://www.gpo.gov/fdsys/pkg/CHRG-109shrg46016/pdf/CHRG-109shrg46016.pdf.

by Collecting and Storing their DNA (Sept. 29, 2005).[10] This small amendment did not obstruct the passage of the large, popular omnibus crime law. However, the impact of arrestee DNA collection did not go entirely unnoticed:

> This adds little or no value for law enforcement, while intruding on the privacy rights of people who are, in our system, presumed innocent. It could also provide an incentive for pretextual and race-based stops and arrests for the purpose of DNA sampling.

Cong. Rec. S11122 (daily ed. Oct. 5, 2005) (statement of Sen. Patrick Leahy). Following the enactment of this new authority, the Department of Justice promulgated final rules requiring federal law enforcement agencies to collect DNA samples from every person arrested under federal authority. 73 Fed. Reg. 74,932, 74,935 (Dec. 10, 2008).

B. The Expansion of CODIS has Continued Without Necessary Legal Safeguards

Congress has repeatedly broadened the DNA collection program to the point where it affects even innocent citizens arrested under federal authority. As the system changes, DNA samples collected under past statutory regimes are retained and subjected to current and future statutory standards. Initially, CODIS was only used for sex offenders. Then it was expanded to all convicts and parolees. Today, state law enforcement agencies collect and retain DNA samples from felony arrestees. Under the Justice

---

[10] http://www.aclu.org/racial-justice_prisoners-rights_drug-law-reform_immigrants-rights/amendment-attached-violence-agains.

Department's regulations, federal law enforcement agencies now collect DNA from all individuals arrested under federal law. *Id.*

State and federal agencies collect and use DNA samples in other contexts as well. Law enforcement has used "DNA dragnets" to sweep up DNA samples from large populations without individualized probable cause. *See, e.g.*, *Kohler v. Englade*, 470 F.3d 1104 (5th Cir. 2006). In *Kohler*, police collected DNA samples from 600 men to try to find a serial rapist-murderer. When Shannon Kohler declined to disclose his DNA, he became a target of the investigation and was publicized in the media. He was later cleared of all suspicion. *Id.* at 1107-08. Dragnets are particularly problematic because individuals may not know they can refuse to participate and may fear reprisals if they do refuse.

The Department of Homeland Security (DHS) uses DNA collection and CODIS data for immigration purposes. The United States Citizenship and Immigration Services (USCIS) uses CODIS to investigate familial relationships between immigrants and U.S. citizens. U.S. Dep't of Homeland Sec., *Teleconference on Biological Relationship Testing: Opportunities and Challenges* (Oct. 30, 2008).[11] DHS also plans to use DNA to identify immigrants seeking to enter the country. U.S. Dep't of Homeland Sec., *Under Secretary Tara O'Toole, Science and Technology Directorate, Before the H. Comm. on Appropriations, Subcomm. on Homeland Sec., "S&T Fiscal Year 2012 Budget*

---

[11] *Available at* http://www.dhs.gov/xfoia/gc_1227730679187.shtm.

Request" (Mar. 30, 2011).[12] DHS is developing small, portable DNA analysis equipment capable of identifying individuals and their familial relations in under an hour. Because the technology is still under development, only USCIS is using it for now. *Id.*[13]

Many states have broad statutes that explicitly permit DNA databases to be used for purposes other than law enforcement, even though DNA is collected to be added to CODIS. Seventeen states allow the use of DNA for non law enforcement purposes including population statistical databases.[14] Seven states allow the use of DNA for non-law enforcement purposes beyond population statistical databases, including research purposes.[15] For example, Maryland allows

---

[12] *Available at* http://www.dhs.gov/y...ews/testimony/testimony_1301519363336.shtm.

[13] A new study shows that it is increasingly possible to identify individuals and their family members from anonymized DNA samples using other widely available demographic information. Gina Kolata, *Online Hunt for DNA Sequences Leaves Privacy Compromised*, N.Y. Times A15 (Jan. 18, 2013). While CODIS profiles are not anonymized, the new research illustrates the importance of safeguarding genetic privacy at all levels.

[14] Ala. Code 975 § 36-18-20 (2012); Ark. Code. Ann. § 12-12-1018 (2012); Iowa Code § 81.3 (2012); La. Rev. Stat. Ann. § 15:612 (2012); Me. Rev. Stat. Ann. tit., 25 § 1577 (2012); Md. Code Ann., Pub. Safety § 2-505 (2012); Mass. Gen Laws. ch. 22E. § 10 (2012); Mich. Comp. Laws § 28.176 (2012); Mo. Rev. Stat. § 650.052 (2012); Mont. Code Ann. § 44-6-102 (2012); Neb. Rev. Stat. § 29-4105 (2012); N.J. Stat. Ann. § 53:1-20.24 (2012); N.M. Stat. § 29-16-8 (2012); N.C. Gen. Stat. § 15A-266.8 (2012); 44 Pa. Cons. Stat. § 2319 (2012); S.C. Code Ann. § 23-3-640 (2012); Wyo. Stat. Ann. § 7-19-402 (2012).

[15] Ala. Code 975 § 36-18-20 (2012); Md. Code Ann., Pub. Safety § 2-505 (2012); Mass. Gen Laws. ch. 22E. § 10 (2012); Mich. Comp. Laws § 28.176 (2012); Neb. Rev. Stat. § 29-4105 (2012);

testing of collected genetic samples for research purposes. Md. Code Ann., Pub. Safety § 2-505 (2012).

Without the application of a clear Fourth Amendment standard protecting genetic material, there is no limiting principle to prevent ongoing expansions in the collection, retention, or use of private genetic information.

II. CODIS Profiles Contain Sensitive Personal Information

DNA identification is not analogous to fingerprint identification because unlike a fingerprint, a DNA sample contains personal information beyond the mere identity of an individual. The government collects and stores this personal information. When the government takes a DNA sample for CODIS, it uses the sample to create a DNA profile of thirteen noncoding loci, and it stores that profile alongside the person's entire genetic sample. Sheldon Krimsky & Tania Simoncelli, *Genetic Justice* 234-35 (2011). For the reasons explained below, neither the CODIS profile nor the full DNA sample is comparable to a fingerprint because CODIS profiles and DNA samples contain substantially more information than is necessary for identification purposes. Unlike fingerprints, DNA is useful for more than identification because it can provide insights into a person's family, "susceptibility to particular diseases, legitimacy of birth, and perhaps predispositions to certain behaviors and sexual orientation." Biological and Envtl. Research Info. Sys. (BERIS), Genome Program, U.S. Dep't of Energy, *Human Genome Project Information: DNA*

S.C. Code Ann. § 23-3-640 (2012); Wyo. Stat. Ann. § 7-19-402 (2012).

Forensics (2009) [hereinafter *DOE DNA Forensics*].[16] Experts have noted that DNA testing can result in "the potential for social stigma, discrimination in employment, barriers to health insurance, and other problems." Anita LaFrance Allen, Genetic Testing, Nature, and Trust, 27 Seton Hall L. Rev. 887 (1997). Congress recognized the importance of these issues when it passed the Genetic Information Nondiscrimination Act of 2008, Pub. L. 110-233, 122 Stat. 861 (2008) (prohibiting use of genetic information for discriminatory purposes). Industry leaders have also taken steps to protect their employees' genetic privacy.[17]

The thirteen noncoding loci the government stores in CODIS contain more information than fingerprints do. The government frequently refers to the noncoding loci stored in CODIS as "junk DNA." However, "no serious scientist refers to noncoding regions of DNA any longer as 'junk.'" Krimsky at 236. Noncoding DNA is genetically significant – that is, it plays an active role in DNA replication and cell division. Noncoding DNA can be used to determine traits such as race and gender. Noncoding DNA can also be used to identify people other than the person from whom it was collected, like their family members.

A. Noncoding DNA is Not "Junk DNA"

Noncoding DNA performs significant genetic functions – it aids in DNA replication and cell

---

[16] http://ornl.gov/sci/techresources/Human_Genome/elsi/forensics.shtml (last modified June 16, 2009).

[17] *See, e.g.*, IBM, *Pioneering Genetic Privacy*, http://www-03.ibm.com/ibm/history/ibm100/us/en/icons/geneticprivacy/ (last visited Jan. 30, 2013).

division. The ENCODE Project Consortium, Nat'l Insts. of Health, *Identification and Analysis of Functional Elements in 1% of the Human Genome by the ENCODE Pilot Project*, 447 Nature 799 (2007).[18] This finding challenged the "long-standing view that the human genome consists of . . . a vast amount of so-called junk DNA that is not biologically active." Nat'l Human Genome Research Inst., Nat'l Insts. Of Health, *New Findings Challenge Established Views on Human Genome* (June 2007).[19] Furthermore, according to the Human Genome Project, "there is a chance that a person's entire genome may be available—regardless of whether they were convicted or not. Although the DNA used is considered 'junk DNA' . . . in the future this information may be found to reveal personal information such as susceptibilities to disease and certain behaviors." *DOE DNA Forensics*.

Scientists and legal scholars recognize that the analogy between fingerprints and DNA profiles is fundamentally flawed because fingerprints are "two-dimensional representations of the physical attributes of our fingertips" that are "useful only for identification," while DNA contains much more personal information. Krimsky at 235; *DOE DNA Forensics*. Unlike DNA profiles

> [f]ingerprints cannot be analyzed to determine whether two individuals are related. They cannot tell you your likelihood of developing Alzheimer's

---

[18] Available at http://www.genome.gov/Pages/Research/ENCODE/nature05874.pdf.

[19] http://www.genome.gov/25521554 (last updated July 7, 2011).

> disease or breast cancer or whether you are a carrier for cystic fibrosis . . . . There is no exponentially growing list of conditions that can be read from a fingerprint, or even significant research in this area.

Krimsky at 235.

By definition, noncoding DNA does not direct the creation of proteins like coding DNA does, but it is active in directing biological functions and influences genetic markers. For example, variations in noncoding DNA can indicate an increased risk of heart disease. A study funded by the National Institutes of Health found that a noncoding DNA sequence reveals the risk of heart disease because "when something goes awry in variants of this interval, [it causes] vascular cells to divide and multiply more quickly than usual." Harrison Wein, *How Junk DNA Affects Heart Disease*, NIH Research Matters (Mar. 1 2010).[20] There is also evidence that noncoding DNA contains biological markers for particular traits, such as hair color and diabetes. For example, researchers identified a marker for red hair in a locus that, like the thirteen used in CODIS, was thought to be non- coding. Grimes E.A., Noake P.J., Dixon L, et al., *Sequence Polyrphism in the Human Melanocortin 1 Receptor Gene as an Indicator of the Red Hair Phenotype*, 122 Forensic Sci. Int'l 124 (2001).

The CODIS loci are presently capable of revealing personal medical information, and such

---

[20] *Available at* http://www.nih.gov/researchmatters/march2010/03012010heart.htm.

noncoding DNA is predicted to reveal more information as analytic methods steadily progress. CODIS loci can convey medical information "where one or more short tandem repeats (STRs) are found to correlate with another genetic marker whose function is known, . . . the presence of the seemingly innocuous STR serves as a 'flag' for that genetic predisposition or trait." Krimsky at 235. In fact, researchers found that one of the CODIS loci is closely related to the gene that codes for insulin, which is connected to diabetes. John D. H. Stead, Jerome Buard, *et al.*, *Influence of Allele Lineage on the Role of the Insulin Minisatellite in Susceptibility to Type 1 Diabetes*, 9 Hum. Molecular Genetics 2929 (2000).

The extent of correlations between noncoding DNA and biological or medical indicia is predicted to increase in the future. Ninety-eight percent of DNA is considered noncoding and is actively being explored because it could have "huge dividends for understanding and treating disease." Harrison Wein, *How Junk DNA Affects Heart Disease*, NIH Research Matters (Mar. 1 2010). A recently developed technique for examining the three dimensional structure of DNA is advancing the understanding of non-coding DNA's impact on human biological functions, and it has detected cross-species similarities that "will speed researchers' efforts to identify functional elements in the human genome and understand how they affect human health." Nat'l Insts. of Health, *DNA Terrain Affects Function in Human Genome*, NIH Research Matters (Mar. 23, 2009).[21] The FBI intends to exploit scientific

---

[21]http://www.nih.gov/researchmatters/march2009/03232009genome.htm (last reviewed Dec. 3, 2012).

advances in DNA analysis by adopting techniques to allow it to expand the amount of data it can extract from CODIS profiles. *See* Fed. Bureau of Investigation, *CODIS – The Future.*[22]

B. The Thirteen CODIS Loci Can Identify an Individual's Race, Ethnicity, and Heritage

It is also possible for researchers to use the thirteen CODIS loci to identify an individual's race, ethnicity, and heritage because different ethnic groups have distinct genetic patterns in these loci. For example, some Chinese populations have enough variation in their thirteen CODIS loci to differentiate the groups consistently by their "geographic location, languages and eating habits." Xing-bo Song, Yi Zhou, et al., *Short-tandem Repeat Analysis in Seven Chinese Regional Populations*, 33 Genetics and Molecular Biology 605 (2010).[23] A Russian population can also be distinguished from Poles, Slovens, Serbs, and Bosnians because of their higher or lower frequencies of certain CODIS alleles. B. A. Malyarchuk, M. Wozniak, *et al., Variation of 15 Autosomal Microsatellite DNA Loci in the Russian Population*, 41 Molecular Biology 1 (2007).[24]

There are similar studies for virtually every ethnic and geographic population in the world. One study used much of this data as a base to predict ethnicity using STRs. The study "performed best for ethnic groups with distinctly different physical

---

[22] http://www.fbi.gov/about-us/lab/codis/codis_future (last visited Jan. 30, 2013).

[23] Available at http://www.scielo.br/pdf/gmb/v33n4/02.pdf.

[24] Available at http://www.zgms.cm.umk.pl/prace/1-4.pdf.

traits." The researchers concluded that this result could "be taken as an indication that STRs, commonly referred to as 'junk' DNA, may have an effect on phenotype." Matthew Graydon, François Cholette, et al., *Inferring Ethnicity Using 15 Autosomal STR Loci—Comparisons Among Populations of Similar and Distinctly Different Physical Traits*, 3 Forensic Sci. Int'l: Genetics 251 (2009).[25] Another study used the thirteen CODIS loci to determine individual ancestry for each member in its sample and found that the method provided "a better measure of ancestral background than self-reported race." Jill S. Barnholtz-Sloan, Ranajit Chakraborty, et al., *Examining Population Stratification via Individual Ancestry Estimates versus Self-Reported Race*, 14 Cancer Epidemiology Biomarkers and Prevention 1545 (2005).[26] They chose to use the CODIS loci to measure ancestry because those "markers show considerable allele frequency variation among racial and ancestral groups from around the world." *Id.* The European Court of Human Rights found that the DNA profiles created by the United Kingdom could be used to distinguish ethnicity, as well as determine family members, and the government did not dispute either finding. *S. & Marper v. United Kingdom*, App. No. 30562/04, paras. 75, 76 (Eur. Ct. H.R. Dec. 4, 2008).[27]

---

[25] *Available at* https://www.ncjrs.gov/App/publications/Abstract.aspx?id=250362.

[26] *Available at* http://cebp.aacrjournals.org/content/14/6/1545.

[27] *Available at* http://www.echr.coe.int/echr/en/hudoc (follow "HUDOC database" hyperlink; search Application Number for "30562/04").

C. Government DNA Profiles Enable Familial Searches and Result in the Identification of Family Members

While fingerprints can only be used to identify the individual from whom they are taken, a CODIS DNA profile may be used to identify the individual's family members and to implicate the individual's family members in investigations in which they would not otherwise be involved. The CODIS loci are frequently used for paternity tests, and "with 13 STR loci it is quite likely that a search of a database will identify a person who is a relative of the person contributing the evidence sample." *DOE DNA Forensics; accord* Austl. Law Reform Comm'n, *Essentially Yours: The Protection of Human Genetic Information in Australia* (2003).[28]

Familial searching using the thirteen CODIS loci has proven extremely effective. A study of California's familial searching protocol found that 93% of fathers and 61% of full siblings were identified by using the thirteen CODIS loci in California's database of approximately one million DNA profiles. S.P. Myers, et al., *Searching for First-degree Familial Relationships in California's Offender DNA Database: Validation of a Likelihood Ratio-based Approach*, 5 Forensic Sci. Int'l: Genetics 493 (2010).[29]

Though the FBI states that familial DNA searching is not performed through CODIS in NDIS, this is based on a selective definition of familial searching, and familial matching does in fact occur. Laboratory Services, Fed. Bureau of Investigation,

---

[28] *Available at* http://www.austlii.edu.au/au/other/alrc/publications/reports/96/.

[29] *Available at* http://projects.nfstc.org/fse/pdfs/familial.pdf.

Familial Searching (2011).[30] The FBI defines familial searching as a "deliberate search of a DNA database conducted for the intended purpose of potentially identifying close biological relatives." *Id.* However, the FBI will allow disclosure of partial DNA matches that may indicate familial relationships. *Id.*

Forensic laboratories conduct DNA database searches with varying degrees of stringency: high stringency searches are discriminating searches intended to produce only direct matches, requiring exact matches at all thirteen loci; crime laboratories also conduct low and moderate stringency searches in which search standards are less discriminating and can generate partial matches. Partial matches contain insufficient common DNA alleles to indicate a definite match, or may indicate that the sample definitely does not match, but may be sufficient to indicate a familial link. Erin E. Murphy, Relative *Doubt: Familial Searches of DNA Databases*, 109 Mich. L. Rev. 291 (2010). A single search in forensic DNA software can return both direct matches as well as partial matches that indicate potential familial relationships. *Id. See also* Emily C. Barbour, Cong. Research Serv., No. R41847, *DNA Databanking: Selected Fourth Amendment Issues and Analysis* (June 6, 2011).[31]

Crime laboratories conduct these lower stringency searches that produce partial matches in several circumstances, including when processing degraded DNA samples. DNA samples are easily degraded both before reaching a lab and once in a lab

---

[30] *Available at* http://www.fbi.gov/about-us/lab/codis/familial-searching (last visited Jan. 30, 2013).

[31] *Available at* http://www.fas.org/sgp/crs/misc/R41847.pdf.

because DNA is very sensitive to environmental conditions and can "start to degrade depending on the sample's exposure to extreme temperatures, oxygen, water, sweat and breath." Donald E. Shelton, *Forensic Science in Court* 29 (2011).

Some forensic experts characterize searches generating partial matches as a type of familial searching, but the FBI does not. By limiting its definition of a familial search to only *deliberate* searches for potential relatives, the FBI excludes moderate stringency searches that happen to result in familial matches from its definition of familial searches for FBI purposes. Laboratory Services, Fed. Bureau of Investigation, *Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System* [hereinafter *FBI CODIS FAQ*].[32] This allows the FBI to claim that CODIS and NDIS are not used for familial searches, though they still produce familial DNA matches and allow investigation of potential family members from the national and state databases. Jessica D. Gabel, *Probable Cause From Probable Bonds: A Genetic Tattle Tale Based on Familial DNA*, 21 Hastings Women's L.J. 3, 17-18 (2010).

The FBI has procedures for authorizing the release of partial match information to law enforcement. "For situations in which there is no other available investigative information," NDIS will release the personally identifiable information of partial match results upon written request from a Casework Laboratory, with concurrence of the prosecutor. *Interim Plan for the Release of*

---

[32] http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet (last visited Jan. 30, 2013).

Information In the Event of a "Partial Match" at NDIS, CODIS Bulletin (July 20, 2006).[33] The written request should "include the statistical analysis used to conclude that there may be a potential familial relationship." *Id.*

The FBI's policy on releasing partial matches from NDIS applies only to the DNA samples collected by federal agencies from federal offenders that constitute NDIS; the procedures by which partial matches and familial matches are produced and released from state and local databases vary from state to state, and laboratory to laboratory.[34] E.g. Md. Code Ann., Pub. Safety § 2-506(d) (2010); 44 Pa. Cons. Stat. § 2319 (2010); Wyo. Stat. Ann. § 7-19-402; Colo. Bureau of Investigation, *DNA Familial Search Policy* (Oct. 22, 2009).[35]

The FBI has suggested guidelines for laboratories releasing partial matches, but they are not binding or official regulations. In 2009, the FBI convened a working group to asses the CODIS partial match procedures; the working group recommended minimum standards of reliability for labs to use when assessing partial matches, but emphasized that decisions to release personal information in response to partial match requests from other labs and law

---

[33] *Available at* http://www.bioforensics.com/conference08/Familial_Searches/CODIS_Bulletin.pdf.

[34] State and local laboratory partial match release practices must meet the minimum requirements of state and federal mandated guidelines.

[35] *Available at* http://www.denverda.org/DNA_Documents/Familial_DNA/CBI%20DNA%20Familial%20Search%20Policy%20Oct%202009%20-%20Signed.pdf.

enforcement agencies are made by individual laboratories. Sci. Working Grp. on DNA Analysis Methods Ad Hoc Committee on Partial Matches, Laboratory Services, Fed. Bureau of Investigation, *SWGDAM Recommendations to the FBI Director on the "Interim Plan for the Release of Information in the Event of a 'Partial Match' at NDIS,"* 11 Forensic Sci. Comm. 4 (Oct. 2009).[36] The Committee's recommendations were to be used "to guide a laboratory's decision making process regarding whether to release the name of the offender whose relative may be the source of the DNA profile." *Id.*

III. Law Enforcement Collects and Indefinitely Retains Entire DNA Samples, Not Just CODIS Profiles

To make DNA profiles, the government collects and retains an individual's full DNA sequence that, unlike a fingerprint, contains personal genetic information unnecessary for identification. The government retains the full DNA samples it collects and laboratories store them indefinitely, in addition to the derivative CODIS profiles. Laboratory Services, Fed. Bureau of Investigation, *Quality Assurance Standards for DNA Databasing Laboratories*, at 7.2 ("Where possible, the laboratory shall retain the database sample for retesting for quality assurance and sample confirmation purposes.").[37] Federal statutes do not set forth clear

---

[36] http://www.fbi.gov/about-us/lab/forensic-science-communications/fsc/archive/oct2009/standard_guidlines/swgdam.html (last visited Jan. 30, 2013).

[37] *Available at* http://www.fbi.gov/about-us/lab/biometric-analysis/codis/qas_databaselabs.pdf (last accessed Jan. 30, 2013).

guidelines for how the samples are handled after they are profiled: "[F]ederal law remains silent as to what must be done with the biological samples themselves." Elizabeth E. Joh, *Reclaiming 'Abandoned' DNA: The Fourth Amendment and Genetic Privacy,* 100 NW. U. L. Rev. 857, 871 (2006).[38] Some bioethics experts consider the "indefinite" retention of DNA samples to be "the most significant privacy concern associated with DNA data banking" because they "have the potential to reveal almost unlimited information about ourselves." Sheldon Krimsky & Tania Simoncelli, Genetic Justice 235-36 (2011).

The information contained in a DNA sample is far more extensive than that contained in fingerprints. It trivializes DNA data to compare it to a genetic fingerprint. Unlike a fingerprint, DNA samples can provide insights into the most personal family relationships and the most intimate workings of the human body, including the likelihood of the occurrence of thousands of genetic conditions and diseases. In fact, "genetic testing is currently available for over 2,200 diseases and abnormalities, with about 2,000 available in clinical settings, and this number continues to increase every year." Ctrs. for Disease Control and Prevention, *Genomic Testing* (May 3, 2011).[39] By testing for one variation in a single region of a particular gene, researchers were able to determine which abused or maltreated children were prone to elevated rates of suicidal

---

[38] *Available at* http://www.law.northwestern.edu/lawreview/v100/n2/857/LR100n2Joh. pdf.

[39] http://www.cdc.gov/genomics/gtesting/.

ideation. Dante Ciccheti, et. al., *Interaction of Child Maltreatment and 5-HTT Polymorphisms: Suicidal Ideation Among Children from low-SES Backgrounds*, 35 J. Pediatr. Psychol. 536, 543 (2010). An allele variation in this same gene creates a predisposition for susceptibility to affective disorders like depression in adults. Christopher G. Beevers, et al., *Association of the Serotonin Transporter Gene Promoter Region (5-HTTLPR) Polymorphism with Biased Attention for Emotional Stimuli*, 118 J. Abnormal Psychol. 431 (2009).

The extensive information DNA can reveal about an individual carries significant social and political implications that do not accompany fingerprints. The extent of these implications was recognized in the legislative history of the DNA Analysis Backlog Elimination Act, 42 U.S.C. § 14135a, emphasizing that the scope of information that can be obtained from a DNA sample is uniquely broad and invasive:

> The information obtainable from DNA testing surpasses any previous types of testing available. The amount of personal and private data contained in a DNA specimen provides insights into the most personal family relationships and the most intimate workings of the human body, including the likelihood of the occurrence of over 4,000 types of genetic conditions and diseases. Genetic information pertains not only to the individual whose DNA is sampled, but also to anyone who shares that bloodline.

H.R. Rep. 106-900(I) at 52 (Sept. 26, 2001).

Studies of the relationship between certain genes and aggressiveness, mental illness, and anti-social behavior have revealed the potential for differential treatment based on genetic predispositions, with or without overt political action. Elisa Piere & Mairi Levitt, *Risky Individuals and the Politics of Genetic Research Into Aggressiveness and Violence*, 22 Bioethics 457, 509 (2008).

A. Maryland, the Federal Government, and Thirty-Seven Other States Require the Indefinite Retention of Complete DNA Samples

State and federal law enforcement agencies collect DNA samples in order to create CODIS profiles. For example, Maryland explicitly requires the indefinite retention of complete DNA samples. Md. Code Ann., Pub. Safety § 2-506 (West 2012). The FBI likewise requires its laboratories to retain samples indefinitely. FBI, *Quality Assurance Standards for DNA Databasing Laboratories*, at 7.2.[40] Additionally, thirty-seven other states affirmatively require retention of DNA samples.[41]

---

[40] http://www.fbi.gov/about-us/lab/codis/qas_databaselabs ("Where possible, the laboratory shall retain the database sample for retesting for quality assurance and sample confirmation purposes.").

[41] Ala. Code § 36-18-22 (2012); Alaska Stat. § 44.41.035 (2012); Ariz. Rev. Stat. Ann. § 13-610 (2012); Ark. Code Ann. § 12-12-1019 (2012); Cal. Penal Code § 295.1 (West 2012); Colo. Rev. Stat. § 16-23-104 (2012); Conn. Gen. Stat. § 54-102i (2012); Ga. Code Ann. § 35-3-162 (2012); Haw. Rev. Stat. § 844D-23 (2012); Idaho Code Ann. § 19-5505 (2012); 730 Ill. Comp. Stat. 5 / 5-4-3 (h) (2012); Ind. Code § 10-13-6-9.5 (2012); Iowa Code § 81.4 (2013); Kan. Stat. Ann. § 21-2511 (2012); La. Rev. Stat. Ann. § 15:606 (2012); Me. Rev. Stat. tit. 25, § 1576 (2012); Minn. Stat. § 299C.155 (2012); Mont. Code Ann. § 44-6-103 (2012); Neb. Rev.

The remaining twelve states do not explicitly require indefinite retention, but the language of their statutes either is silent on the issue or does not foreclose it.[42]

The ability of innocent arrestees to have their DNA records expunged is an insufficient and inconsistent protection of genetic privacy. Destruction of DNA samples and expungement of CODIS profiles under state and federal law, where available, imposes a substantial burden on innocent individuals. Most expungement procedures are complicated and costly. Federal law requires both state and federal law enforcement agencies to expunge CODIS profiles if an individual is acquitted, charges are dismissed, or a conviction is overturned.

Stat. § 29-4105(4) (2012); N.H. Rev. Stat. Ann. § 651-C:2 (2012); N.J. Stat. Ann. § 53:1-20.21 (West 2012); N.M. Stat. Ann. § 29-16-4 (2012); N.Y. Crim. Proc. Law § 995-C (McKinney 2012); N.C. Gen. Stat. § 15A-266.3 (2012); Ohio Rev. Code Ann. § 109.573 (LexisNexis 2012); Okla. Stat. tit. 74, § 150.27a (2012); 44 Pa. Cons. Stat. § 2313 (2012); R.I. Gen. Laws § 12-1.5-5 (2012); S.C. Code Ann. § 23-3-640 (2012); Tenn. Code Ann. § 38-6-113 (2012); Tex. Gov't Code Ann. § 411.142 (West 2012); Utah Code Ann. § 53-10-406 (2012); Va. Code Ann. § 19.2-310.4 (2012); Wash. Rev. Code § 43.43.754(4) (2012); W. Va. Code § 15-2B-8 (2012); Wyo. Stat. Ann. § 7-19-402 (2012).

[42] Del. Code Ann. tit. 29, § 4713 (2012); Fla. Stat. § 943.325 (2012); Ky. Rev. Stat. Ann. § 17.175 (West 2012) (requiring destruction of all samples not entered into database); Mass. Gen. Laws ch. 22E § 6 (2012); Mich. Comp. Laws. § 28.176 (2012); Miss. Code Ann. § 45-33-37 (2012); Mo. Rev. Stat. §§ 650.050-060 (2012); Nev. Rev. Stat. § 176.0912 (2012) (requiring retention at least until criminal sentence is completed); N.D. Cent. Code § 31-13-05 (2012); Or. Rev. Stat. § 181.085(1)(e) (2012) (allowing state police to establish procedures for "storing and destroying" samples); Vt. Stat. Ann. tit. 20, § 1938 (2012); Wis. Stat. § 165.77 (2012).

42 U.S.C. § 14132(d) (2012). But the statute does not require the destruction of DNA samples. Id. Current FBI policy is to destroy the sample, but the agency is not required to do so. Laboratory Services, Fed. Bureau of Investigation, *CODIS Expungement Policy*.[43] The statute also does not allow expungement for convicts who have completed their sentences. 42 U.S.C. § 14132(d). Expungement is not automatic; qualified individuals must specifically request that their CODIS profiles be expunged. Id.

State law enforcement agencies store their collected DNA samples according to state guidelines and "many state laws do not require the destruction of a DNA record or sample after a conviction has been overturned." *DOE DNA Forensics*. Most states will only expunge DNA records if an individual petitions for expungement and satisfies the complicated procedural requirements.[44] Seven states do not

---

[43] http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis_expungement (last visited Jan. 28, 2013)

[44] *See* Alaska Stat. § 44.41.035(i) (2012); Ark. Code Ann. § 12-12-1019 (2012); Cal. Penal Code § 299 (West 2012); Colo. Rev. Stat. § 16-23-105 (2012); Del. Code Ann. tit. 29, § 4713(i) (2012); Fla. Stat. § 943.325(16) (2012); Ga. Code Ann. § 35-3-165 (2012); Haw. Rev. Stat. § 844D-71 (2012) *et seq.*; Idaho Code Ann. § 19-5513 (2012); 730 Ill. Comp. Stat. 5 / 5-4-3 (f-1) (2012); Ind. Code § 10-13-6-18 (2012); Iowa Code § 81.9 (2013); Kan. Stat. Ann. § 21-2511 (2012); Ky. Rev. Stat. Ann. § 17.175(5) (West 2012); La. Rev. Stat. Ann. § 15:614 (2012); Me. Rev. Stat. tit. 25, § 1576 (2012); Mich. Comp. Laws. § 28.176 (10), (11) (2012); Mo. Rev. Stat. § 650.055(a) (2012); Neb. Rev. Stat. § 29-4109 (2012); N.H. Rev. Stat. Ann. § 651-C:5 (2012); N.J. Stat. Ann. § 53:1-20.25 (West 2012); N.M. Stat. Ann. § 29-16-10 (2012); N.Y. Crim. Proc. Law § 995-C(9) (McKinney 2012); Or. Rev. Stat. § 181.085(8)(a) (2012); 44 Pa. Cons. Stat. § 2321 (2012); R.I. Gen. Laws § 12-1.5-13 (2012); Utah Code Ann. § 53-10-40(6) (2012); Va. Code Ann. §

mandate expungement of DNA samples at all, only CODIS profiles.[45] Upon acquittal or dismissal of charges, seven other states, including Maryland, automatically expunge DNA samples and CODIS profiles.[46] However, in Maryland, records are not eligible for expungement if an individual receives probation, has his charges docketed, or receives a conditional pardon. Md. Code Ann., Pub. Safety § 2-511 (2012).

In addition, four states have no expungement rights at all.[47] Unless charges are dismissed, some jurisdictions will not expunge arrestee DNA until the statutes of limitations on all charged crimes have expired. *See, e.g.*, *Haskell v. Harris*, 669 F.3d 1049, 1052 (2012). In Arizona, qualifying arrestees can expunge their DNA samples, but other offenders can only expunge their CODIS profiles. Ariz. Rev. Stat.

19.2-310.7 (2012); W. Va. Code § 15-2B-11 (2012); Wis. Stat. § 165.77(4) (2012).

[45] *See* Ala. Code § 36-18-26 (2012); Me. Rev. Stat. tit. 25, § 1577(4) (2012); Mass. Gen. Laws ch. 22E § 15 (2012); Mont. Code Ann. § 44-6-107 (2012); Okla. Admin. Code § 375:30-9-2 (2012); Tex. Gov't Code Ann. § 411.151 (West 2012); Wyo. Stat. Ann. § 7-19-405 (2012).

[46] Conn. Gen. Stat. § 54-102 (2012); Md. Code Ann., Pub. Safety § 2-511 (West 2012); Minn. Stat. § 299C.105(3) (2012); N.C. Gen. Stat. § 15A-266.3A (2012); S.C. Code Ann. § 23-3-660 (2012); Tenn. Code Ann. § 40-35-321 (2012); Vt. Stat. Ann. tit. 20, § 1940 (2012).

[47] Mississippi, Nevada, Ohio, and Washington. *See* Miss. Code Ann. § 45-33-37 (2012) (no related provisions on expungement found); Nev. Rev. Stat. § 176.0912 (2012) (no related provisions on expungement found); Wash. Admin. Code § 446.75.070 (2012) (stating that expungement is completely discretionary); *State v. Emerson*, 2012 Ohio 5047 (2012) (holding that Ohio law provides no right to expungement).

Ann. § 13-610 (J), (M) (2012). In Michigan, those with overturned convictions can only have their DNA samples and profiles expunged if they have no other convictions and a court finds that a "miscarriage of justice" occurred. Mich. Comp. Laws. § 28.176 (10) (2012). As a result of the complicated patchwork of expungement laws and procedures varying from state to state, individuals' complete DNA samples often stay in the government's possession even when those individuals are deemed innocent of any wrongdoing.

B. Retention of Complete DNA Samples is an Unnecessary and Broad Invasion of Genetic Privacy

More than two decades ago, the National Academy of Sciences recommended that DNA samples be destroyed "promptly" after analysis. *DNA Technology in Forensic Science,* Comm. on DNA Tech. in Forensic Sci. of the Nat'l Acad. of Sci. 122 (1992). The Academy reasoned, "In principle, retention of DNA samples creates an opportunity for misuses *i.e.,* for later testing to determine personal information." *Id.* Yet state and federal law enforcement agencies continue to retain genetic samples even after creating the CODIS profile. EPIC has previously argued that the warrantless, suspicionless collection of DNA for CODIS profiling violates the Fourth Amendment.[48] However, even if CODIS profiling were permissible, the indefinite

---

[48] *See* Br. of Amici Curiae EPIC. et. al. in Supp. of Pet., *Kohler v. Englade*, 470 F.3d 1104 (5th Cir. 2006); Br. of Amici Curiae EPIC, et. al. in Supp. of Resp't., *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004), *cert. denied* 544 U.S. 924 (2005); and Br. of Amici Curiae EPIC, et. al. in Supp. of Resp't., *State v. Raines*, 857 A.2d 19 (Md. 2004).

retention of complete DNA samples is an unreasonable infringement of genetic privacy rights.

These DNA samples contain a wealth of personal information. Such samples can provide insights into a person's family, "susceptibility to particular diseases, legitimacy of birth, and perhaps predispositions to certain behaviors and sexual orientation." Biological and Envtl. Research Info. Sys. (BERIS), *Human Genome Project Information: DNA Forensics*, U.S. Dep't of Energy Genome Program.[49] For example, genetic factors can combine with environmental processes to create vulnerabilities for behavioral issues, emotional problems, and substance abuse. *See, e.g.*, Ronald Simons, et. al., *Differential Susceptibility to Context: A Promising Model of the Interplay of Genes and the Social Environment*, 29 Biosociology and Neurosociology: Advances in Group Processes 139 (Kalkhoff, et. al. ed. 2012); Gene H. Brody, et. al., *Using Genetically Informed, Randomized Prevention Trials to Test Etiological Hypotheses about Child and Adolescent Drug Use and Psychopathology*, Am. J. of Pub. Health (forthcoming 2013) (forthcoming 2013) (manuscript on file with EPIC).

The indefinite retention of complete DNA samples exacerbates "the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files." *Whalen v. Roe*, 429 U.S. 589, 605 (1977). The Maryland high court properly recognized the distinction between the privacy threat presented by DNA collection generally and the

---

[49]http://www.ornl.gov/sci/techresources/Human_Genome/elsi/forensics.shtml (last modified June 16, 2009).

substantial risks associated with retention of DNA samples specifically. "[W]e can not turn a blind eye to the vast genetic treasure map that remains in the DNA sample retained by the State." *King v. State*, 42 A.3d 549, 577 (2012).

At issue in this case is not just the Respondent's identity contained in his CODIS profile, but also the State's seizure and indefinite retention of his entire genetic record.

C. Federal and State Statutory Provisions are Insufficient to Safeguard DNA Samples and Individuals' Genetic Privacy

Statutory protections are insufficient to cure the constitutional defect of the warrantless indefinite retention of genetic material. Current state and federal statutes show that genetic information is highly sensitive and subject to a substantial threat of misuse. Maryland and Federal law both create criminal penalties for anyone who obtains, uses, or discloses genetic information without authorization. Md. Code Ann., Pub. Safety § 2-512 (2012); 42 U.S.C. § 14135e (2012). Many other states do as well. While these statutory provisions are appropriate and necessary, they do not reduce the minimum privacy protections guaranteed by the Constitution.

The Fourth Amendment sets a constitutional floor that protects the privacy of individuals from unwarranted government intrusion.[50] States can

---

[50] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

regulate upward to add further safeguards, but they cannot give citizens lesser protection than the Constitution itself guarantees. "[W]e cannot forgive the requirements of the Fourth Amendment in the name of law enforcement." *Berger v. New York*, 388 U.S. 41, 63 (1967). The *Amici* States contend that their statutes foreclose all foreseeable abuse of genetic information. Br. for the States as *Amici Curiae* Supporting Pet. at 24-32. But it is antithetical to the principles of the Fourth Amendment to merely trust the government not to overstep the bounds of individual privacy. "With the benefits of more efficient law enforcement mechanisms comes the burden of corresponding constitutional responsibilities." *Arizona v. Evans*, 514 U.S. 1, 17-18 (1995) (O'Connor, J. concurring). Just because today's statutes limit the use and disclosure of genetic information does not mean that indefinite retention of complete DNA samples "compl[ies] with the basic command of the Fourth Amendment." *Berger* at 63.

Moreover, statutory protections of private information are often inadequate practical safeguards against real-world misuse. In *NASA v. Nelson*, respondents and *amici* argued that statutory provisions preventing disclosure would be insufficient to protect highly sensitive personal information accumulated by NASA. Br. for Resp't at 43-46, 131 S. Ct. 746 (2011); Br. of *Amici Curiae* EPIC, et. al. in Supp. of Resp't. at 20-34, 131 S. Ct. 746 (2011). "Even the most rigorous statutory protections are no guarantee against exposure of personal information in data breaches." Br. of *Amici Curiae* EPIC, et. al. at 28. This Court disagreed, ruling that the statutory regime in question provided adequate protections. *Nelson* at 761-63. However, the scenario Nelson feared came to pass not once. but twice in this past

year. On March 16, 2012 and again on November 13, 2012, NASA notified its employees of data breaches resulting in the disclosure of their sensitive personal information. *NASA KSC Internal Memo: NASA KSC Laptop Theft*, SpaceRef (March 20, 2012);[51] *Agencywide Message to All NASA Employees: Breach of Personally Identifiable Information (PII)*, SpaceRef (Nov. 13, 2012).[52]

The best way to minimize privacy risks is to minimize the amount of sensitive information the government collects and retains in the first place. Destroying DNA samples after analysis would reduce the risks to individuals' genetic privacy without compromising law enforcement's capabilities.

IV. The Federal Bioethics Commission Recommends Limiting Nonconsensual Law Enforcement Access to Biospecimens

The Presidential Commission for the Study of Bioethical Issues recently highlighted privacy issues presented by whole genome sequencing. *Privacy and Progress in Whole Genome Sequencing*, Pres. Comm'n for the Study of Bioethical Issues (Oct. 2012).[53] The commission is composed of an advisory panel of leaders in the fields of medicine, science, ethics, religion, law, and engineering.[54] The report says that

---

[51] http://www.spaceref.com/news/viewsr.html?pid=40332.

[52] http://spaceref.com/news/viewsr.html?pid=42609.

[53] *Available at* http://bioethics.gov/cms/sites/default/files/PrivacyProgress508.pdf.

[54] The members and staff hold twenty Ph.D.'s, ten J.D.'s, five M.D.'s, and numerous other advanced degrees. The Commission is chaired by Dr. Amy Gutmann, President of the University of Pennsylvania, and vice-chaired by Dr. James W. Wagner,

genetic information is so comprehensive that it does not just implicate personal privacy, but the very core of a person's identity:

> More than other medical information, such as X-rays, our genomes reveal something both objectively more comprehensive and subjectively (to many minds) more fundamental about who we are, where we came from, and the health twists and turns that life might have in store for us.

Id. at 24. The Commission explained that protection of individual privacy interests is essential to ethically "realize this promise of the great public good" inherent in genetic information. *Id.* at 2. Consequently, the Commission proposed several specific recommendations to safeguard genetic privacy.

In particular, the Commission recommended that "[o]nly in exceptional circumstances should entities such as law enforcement or defense and security have access to biospecimens or whole genome sequence data for non health-related purposes without consent." *Id.* at 84.

As our knowledge of genetics and its capabilities continues to expand, it brings with it new challenges to privacy. Once an individual's DNA sample is in a government database, protecting that information from future exploitation becomes more difficult.

President of Emory University. Among others, members include the Chief Medical Officer of the Department of Homeland Security and the Chief of the Bioethics Department at the National Institutes of Health Clinical Center. *Id.* at vii-viii.

> This makes it important that governments and societies take great care not to make decisions that have a substantial chance of causing irreversible harm to current or future generations, and especially those who have little or no say over such decisions.

Id. at 45.

The principles guiding the Presidential Commission should likewise guide the collection and use of DNA in the law enforcement context. The complete DNA samples retained by law enforcement can be used for whole genome sequencing, giving rise to the risks the Commission identified. Even if federal, state, and local agencies could collect DNA for the CODIS database, such collection would still be invalid so long as it involves the indefinite retention of the DNA samples. Law enforcement agencies cannot warrantlessly collect and indefinitely retain genetic samples without infringing genetic privacy rights.

CONCLUSION

For the foregoing reasons, *amici* respectfully ask this Court to affirm the decision of the Court of Appeals of Maryland below.

Respectfully submitted,

MARC ROTENBERG
ALAN BUTLER
DAVID BRODY
ELECTRONIC PRIVACY
INFORMATION CENTER (EPIC)
1718 Connecticut Ave. NW
Suite 200
Washington, DC 20009
(202) 483-1140

February 1, 2013

AMICUS CURIAE BRIEF

No. 12-207

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MARYLAND, *Petitioner*,

v.

ALONZO JAY KING, JR., *Respondent*.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF 14 SCHOLARS OF FORENSIC EVIDENCE AS *AMICI CURIAE* SUPPORTING RESPONDENT

BRANDON L. GARRETT

UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
580 Massie Road
Charlottesville, VA 22902
(434) 961-2513

ERIN MURPHY
Counsel of Record
NEW YORK UNIVERSITY
SCHOOL OF LAW
40 Washington Square
New York, NY 10012
(212) 998-6672
erin.murphy@nyu.edu

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

Page

Table of Authorities iv

Interest of *Amici Curiae* 1

Summary of Argument of *Amici Curiae* 1

Argument 3

Maryland overstates the strength of its interest in adding arrestees to its database 3

A. Arrestee sampling does not effectively serve crime-solving interests. 3

1. The available empirical evidence indicates that adding crime scene samples solves more crime. 3

2. Additional evidence is unavailable because the government refuses to permit qualified researchers access to the database. 6

B. Convicted offender sampling achieves the government's crime-solving goals 10

1. Convicted offender sampling meets the government's interest. 10

2. The anecdotal "preventable crime studies" are nonscientific and unreliable. 11

C. Arrestee sampling may in fact harm effective law enforcement..... 13

1. Arrestee sampling diverts resources from more valuable efforts, like increasing the quality and quantity of collected crime scene samples. 13

2. Sampling of arrestees exacerbates the problems of erroneous duplicate entries and backlogs. 18

Arrestee sampling is more likely to harm than help the innocent. 21

A. Arrestee sampling is not necessary to exonerate the innocent. 21

B. Forensic DNA analysis can, and has, resulted in false matches and wrongful convictions. 25

1. The subjective nature of forensic DNA analysis can lead to false database hits. 26

2. False attributions can occur as a result of contamination, transfer, or deliberate malfeasance..... 28

3. Expanded suspect databases elevate the risk of adventitious, or false positive, matches. 33

C. Forensic DNA technology continues to evolve and new methods are initiated without direct judicial oversight..... 36

1. Law enforcement currently uses the CODIS loci to identify offenders' relatives..... 36

2. Scientists have announced new genetic tests that determine age, bioancestry, eye color, hair color, facial structure, and other visible characteristics. 38

3. New DNA tests and technologies typically enter service without direct judicial or legislative oversight..... 40

Conclusion 41

Appendix of *amici* A-1

TABLE OF AUTHORITIES

Page

CASES

District Atty's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52 (2009) 26

Haskell v. Harris, 669 F.3d 1049 (9th Cir.) *reh'g granted en banc*, 686 F.3d 1121 (9th Cir. 2012) 23

STATUTES AND RULES

Md. Code Ann. Crim. Proc. § 8-201 (2009) 24

Md. Code Ann. Pub. Safety § 2-506 (2010) 37

Supreme Court Rule 37.6 1

MISCELLANEOUS

4 Mod. Sci. Evidence § 31:15 (2012-13 edition) 29, 31, 32

Appellant's Reply Br., *Haskell v. Harris*, No. 10-15152 (9th Cir. Apr. 1, 2010) 12

Frederick R. Bieber, *Turning Base Hits into Earned Runs: Improving the Effectiveness of Forensic Data Bank Programs*, 34 J.L. Med. & Ethics 222 (2006) 7

Ethan Bronner, *Lawyers, Saying DNA Cleared Inmate, Pursue Access to Data*, N.Y. TIMES, Jan. 3, 2013 23

Bulletin from the Combined DNA Index System, *Interim Plan for Release of Information in the Event of a "Partial Match" at NDIS* (July 20, 2006) (Bulletin No. BT072006) 37

Andrea M. Burch, Matthew R. Durose, & Kelly A. Walsh, *Census of Publicly Funded Forensic Crime Laboratories*, DEP'T OF JUST. BUREAU OF JUST. STATS. (2009), http://bjs.ojp.usdoj.gov/content/pub/pdf/cpffcl09.pdf 19, 31

John M. Butler & Bruce M. McCord, *Advanced Topics in STR DNA Analysis: STR Mixture Interpretation*, American Academy of Sciences Annual Meeting (2006), http://www.cstl.nist.gov/strbase/pub_pres/AAFS2006_mixtures.pdf 27

John M. Butler, *Fundamentals of Forensic DNA Typing* (2010) 35

Edward Connors et al., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, U.S. DEP'T OF JUST. (1996), https://www.ncjrs.gov/pdffiles/dnaevid.pdf..... 21

DNA Statistics, MARYLAND.GOV, http://www.goccp.maryland.gov/dna/statistics.php (last updated Jan. 22, 2013)..... 7

Maura Dolan & Jason Felch, *DNA: Genes as Evidence: The Danger of DNA: It Isn't Perfect*, L.A. TIMES, Dec. 26, 2008, at 1..... 24, 29

Itiel Dror & Greg Hampikian, *Subjectivity and bias in forensic DNA mixture interpretation*, 51 Sci. & Just. 204 (2011).... 26, 27

Easy Access to FBI Arrest Statistics, U.S. DEP'T OF JUST. OFF. OF JUV. JUST. AND DELINQ. PREVENTION, http://ojjdp.gov/ojstatbb/ezaucr/asp/ucr_display.asp (last visited Jan. 27, 2013) 12

ENFSI DNA Working Group, *DNA-Database Management: Review and Recommendations*, ENFSI (April 2012), http://www.enfsi.eu/sites/default/files/documents/enfsi_document_on_dna-database_management_2012_0.pdf..... 33, 34

THE ETHICS GROUP: NAT'L DNA DATABASE, 1ST ANNUAL REPORT: THE ETHICS GROUP NATIONAL DNA DATABASE (THE HOME OFFICE), April 2008 (U.K.), http://www.homeoffice.gov.uk/publications/police/operational-policing/NDNAD_Ethics_Group_Annual_Report?view=Binary 5, 6

FAMILY TREE DNA, www.familytreedna.com (last visted Jan. 27, 2013) 40

Jason Felch & Maura Dolan, *DNA: Genes as Evidence: FBI Resists Scrutiny of 'Matches'*, L.A. Times, July 20, 2008, at A1 ..... 20, 25

Matthew Gabriel, *Beyond the Cold Hit*, 38((2) J.L. Med. & Ethics 397 (2010) 7

Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (2011) 16, 22, 28

Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 80 (2009) 16

Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051 (2010) 22

Joseph Goldstein, *New York Examines Over 800 Rape Cases for Possible Mishandling of Evidence*, N.Y. TIMES, Jan. 10, 2013. 32

Joseph Goldstein & J. David Goodman, *3 Years After Inception, A DNA Technique Yields Little Success for the Police*, N.Y. TIMES, Jan. 27, 2013. 37

Chris Gordon, *DNA Backlog in Prince George's County*, NBCWASHINGTON.COM (July 16, 2012, 9:39 PM) 18

Jeremiah Goulka et al., *Towards a Comparison of DNA Profiling and Databases in the United States and England*, RAND CORP. CENTER ON QUALITY POLICING (2010), http://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR918.pdf 4, 5, 6

Frank Green, *Results of Post-Conviction DNA Testing to be Released*, RICHMOND TIMES-DISPATCH, May 10, 2012 24

D.R. Hares, *Expanding the CODIS Core Loci in the United States*, Forensic Sci. Int. Genet. 6 (2012) 41

Frank Horvath et al., *A National Survey of Police Policies and Practices Regarding the Criminal Investigation Process: Twenty-Five Years After RAND* (Nov. 2001), https://www.ncjrs.gov/pdffiles1/nij/grants/202902.pdf 13

Uta-Dorothee Immel et al., *Y-chromosomal STR haplotype analysis reveals surname-associated strata in the East-German population*, 14 Eur. J. Hum. Genetics 577 (2006) 40

E. Kafarowski et al., *The retention and transfer of spermatozoa in clothing by machine washing*, 29 Canadian Soc. Forens. Sci. J. 7 (1996) 30

Brendan Keating *et al.*, *First all-in-one diagnostic tool for DNA intelligence: genome-wide inference of biogeographic ancestry, appearance, relatedness, and sex with the Identitas v1 Forensic Chip*, INT. J. LEGAL MED. (Nov. 13, 2012).... 38, 39

Know the Cases: Cody Davis, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Cody_Davis.php (last visited Jan. 27, 2013) 19

Know the Cases: Marlon Pendleton, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Marlon_Pendleton.php (last visited Jan. 27, 2013) 16

Gina Kolata, *Web Hunt for DNA Sequences Leaves Privacy Compromised*, N.Y. TIMES, Jan. 17, 2013..... 39

D. E. Krane et al., *Time for DNA Disclosure*, 326 Science 1361 (2009) 25

Alex Lowe et al., *The propensity of individuals to deposit DNA and secondary transfer of low level DNA from individuals to inert surfaces*, 129 Forensic Sci. Int'l 25 (2002)..... 30

Maryland State Police Forensic Sciences Division, *Statewide DNA Database Report* (Apr. 2012), tinyurl.com/marylandreport 7, 10

Memorandum Submitted by GeneWatch UK, HOME AFFAIRS COMMITTEE, THE NATIONAL DNA DATABASE (HOUSE OF COMMONS), EIGHTH REPORT, 2009-10, HC 222-II (U.K.), *available at* http://www.publications.parliament.uk/pa/cm200910/cmselect/cmhaff/222/222ii.pdf 5

Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 Mich. L. Rev. 291 (2010) 37, 38, 40

Erin Murphy, *The Art in the Science of DNA: A Layperson's Guide to the Subjectivity Inherent in Forensic DNA Typing*, 58 Emory L.J. 489 (2008) 26

Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 Cal. L. Rev. 721 (2007) 17, 24

Nat'l Comm. on the Future of DNA Evidence, U.S. Dep't of Just., *What Every Law Enforcement Officer Should Know about DNA Evidence* (1990), https://www.ncjrs.gov/pdffiles1/nij/bc000614.pdf 29

National DNA Database: Submission to the Home Affairs Committee, GENEWATCH UK (Jan. 2010), *available at* http://www.genewatch.org/uploads/f03c6d66a9b354535738483c1c3d49e4/GWsub_Jan10.doc 5, 6

Nat'l Inst. of Just., *Fiscal Year 2012 Awards*, http://nij.gov/nij/funding/awards/2012.htm (last visited January 26, 2013)..... 40

Nat'l Res. Council Comm. on Identifying the Needs of the Forensic Sci. Cmty., *Strengthening Forensic Science in the United States: A Path Forward* (2009) 15, 31

Oversight of the Department of Justice's Forensic Grant Programs: Hearing Before the S. Comm. on the Judiciary, 110th Cong. (2008) (statement of Glenn A. Fine, Inspector General, U.S. Department of Justice)..... 32

Joseph Peterson et al., *Final Report: The Role and Impact of Forensic Evidence in the Criminal Justice Process*, NAT'L INST. OF JUST. (2010), https://www.ncjrs.gov/pdffiles1/nij/grants/231977.pdf.....14, 15, 17, 18

Plaintiff-Appellants' Motion for Judicial Notice, *Haskell v. Harris*, No. 10-15152 (9th Cir. Aug. 31, 2012)..... 9

Postconviction DNA Testing Assistance Program Roundtable Summary, NAT'L INST. OF JUST. (Oct. 21, 2011), http://www.nij.gov/topics/forensics/postconviction/roundtable/welcome.htm 25

John K. Roman et al., *The DNA Field Experiment: Cost Effectiveness Analysis of the Use of DNA in the Investigation of High-Volume Crimes* (2008) 17

Sarah M. Ruby, *Checking the Math: Government Secrecy and DNA Databases*, 6 I/S J. OF L. & POL'Y 257 (2010) 25

Julie Samuels et al., *Collecting DNA From Arrestees: Implementation Lessons*, URB. INST. (2012) 20

William S. Sessions, *DNA Evidence and the Death Penalty*, JURIST (May 30, 2007), *available at* http://jurist.org/forum/2007/05/dna-evidence-and-death-penalty.php 21

Dana Hawkins Simons, *Getting DNA to bear witness*, 134 (22) U.S. NEWS 50 (July 2003) 39

Kevin Strom et al., *2007 Survey of Law Enforcement Evidence Processing: Final Report* (Oct. 2009), https://www.ncjrs.gov/pdffiles1/nij/grants/228415.pdf 15, 16

Testimony of Sir Alec Jeffreys, HOME AFFAIRS COMMITTEE, THE NATIONAL DNA DATABASE (HOUSE OF COMMONS), EIGHTH REPORT, 2009-10, HC 222-II (U.K.) 35, 36

William C. Thompson et al., *Forensic DNA Statistics: Still Controversial in Some Cases*, 36 THE CHAMPION 10, 12-23 (Dec. 2012)..... 27

William C. Thompson, *The Myth of Infallibility*, *in* GENETIC EXPLANATIONS: SENSE AND NONSENSE 232 (Sheldon Krimsky & Jeremy Gruber eds., 2012) .....*passim*

Transcript of Sentencing Hrg., Maryland v. King, (Oct. 7, 2010) (No. K09-0807)..... 11

Jennifer L. Truman & Michael R. Rand, *Crime Victimization, 2009*, U.S. DEP'T OF JUST. BUREAU OF JUST. STATS. (Oct. 2010), http://bjs.ojp.usdoj.gov/content/pub/pdf/cv09.pdf..... 17

Jackie Valley, *Metro reviewing DNA cases after error led to wrongful conviction*, LAS VEGAS SUN, July 7, 2011 29

Susan Walsh et al., IrisPlex: *A sensitive DNA tool for accurate prediction of blue and brown eye color in the absence of ancestry information*, 5 FORENSIC SCI. INT'L GENETICS 170 (2011)..... 39

Marie Woolf, *DNA database chaos with 500,000 false or misspelt entries*, THE (U.K.) INDEPENDENT, Aug. 26, 2007, http://www.independent.co.uk/news/uk/politics/dna-database-chaos-with-500000-false-or-misspelt-entries-463055.html 20

D. Zubakov et al., *Estimating human age from T-cell rearrangements*, 20(22) Current Biology (2010) 39

INTEREST OF *AMICI CURIAE*

Amici Curiae are scholars who research and write about criminal procedure, evidence, and forensic science.[1]

SUMMARY OF ARGUMENT OF *AMICI CURIAE*

Amici develop two arguments. First, the expansion of DNA databases to include arrestees does not serve the asserted state interest in efficient criminal investigations. No evidence shows that arrestee sampling meaningfully enhances crime-solving. Instead, research demonstrates that the collection and uploading of more samples from unsolved crimes improves crime-solving. At present, physical evidence is not collected from two-thirds of serious crime scenes, and crime labs actually test submitted evidence in a still smaller fraction of cases. Filling DNA databases with arrestees hinders effective law enforcement, because it increases the probability of entry errors and duplicates, and exacerbates backlogs in the processing of more valuable samples.

Second, arrestee sampling is not necessary to protect the innocent. The lack of adversarial safeguards, such as pre- and post-conviction defense access to DNA methods and databases, severely

---

[1] Pursuant to Rule 37.6, *Amici Curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *Amici Curiae* has made a monetary contribution to the preparation or submission of this brief. Counsel for the parties have consented to the filing of this brief.

curtails the exculpatory capacity of DNA technology. At the same time, human error and subjective DNA analysis can and have led to false accusations. Moreover, genetic research is rapidly evolving. A wide range of once unthinkable uses of DNA in criminal investigations are now available. Investigators currently use DNA technology to find and test family members who were not themselves necessarily arrested or convicted of any offense. Tests also exist to discern physical traits like age, skin tone, and hair and eye color, and future advances may permit analysts to glean medical or psychological traits of a suspect.

ARGUMENT

MARYLAND OVERSTATES THE STRENGTH OF ITS INTEREST IN ADDING ARRESTEES TO ITS DATABASE.

Maryland offers four reasons to support its interest in expanding DNA collection to arrestees. Pet. Br. 9-10. *Amici* focus on the third and fourth interests: more efficient criminal investigations and enhancing the efficacy of DNA databases.

At first glance, Maryland's claim has superficial appeal. It seems logical that adding a large number of known profiles to the DNA database might solve a large number of crimes. But closer scrutiny reveals this assumption to be misplaced and unfounded. Not only is there a lack of evidence to support that proposition, but in fact research shows that adding arrestee profiles decreases the efficiency of DNA databases.

A. Arrestee sampling does not effectively serve crime-solving interests.

1. The available empirical evidence indicates that adding crime scene samples solves more crime.

Maryland asserts that compulsory arrestee DNA sampling increases database efficiency. An interest in improving the efficiency of a database is a novel justification for a suspicionless search of a suspect. Putting that to one side, Maryland never supports the claim that "bigger" is necessarily better where

DNA databases are concerned. That claim is contradicted by available empirical research.

Law enforcement in the United States, including in the state of Maryland, discloses virtually no data about the operation of databases. That is why a report by the RAND Corporation is particularly noteworthy. Researchers "found that database matches are more strongly related to the number of crime-scene samples than to the number of offender profiles in the database." Jeremiah Goulka et al., *Towards a Comparison of DNA Profiling and Databases in the United States and England*, RAND CORP. CENTER ON QUALITY POLICING, 1 (2010), http://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR918.pdf. The report compared a number of U.S. states in reaching this conclusion. For example:

> As of August 2010, the state of Illinois—which does not include any felony arrestees and includes only those misdemeanants who are convicted of sex crimes—had an offender database about 29 percent the size of California's but had 88 percent the number of investigations aided. New York . . . had an offender database just over one quarter the size of California's, yet it had 80 percent as many matches as California. This is most likely because New York's crime-scene sample database was 8 percent larger than California's, while Illinois' was only 24 percent smaller at the same point in time.

Id. at 19-20 (showing tight correlation between forensic samples and database matches versus poor relationship between offender samples and database matches).

Empirical studies from the U.K. affirm these findings. *See* THE ETHICS GROUP: NAT'L DNA DATABASE, 1ST ANNUAL REPORT: THE ETHICS GROUP NATIONAL DNA DATABASE (THE HOME OFFICE), April 2008, at 1.1 (U.K.), http://www.homeoffice.gov.uk/publications/police/operational-policing/NDNAD_Ethics_Group_Annual_Report?view=Binary. Between 1998 and 2003, the number of *crime scene samples* uploaded to the U.K.'s National DNA Database ("NDNAD") tripled, and a substantial increase in the number of matches resulted during this period. *Memorandum Submitted by GeneWatch UK*, HOME AFFAIRS COMMITTEE, THE NATIONAL DNA DATABASE (HOUSE OF COMMONS), EIGHTH REPORT, 2009-10, HC 222-II, at Ev32 tbl.1 (U.K.), *available at* http://www.publications.parliament.uk/pa/cm200910/cmselect/cmhaff/222/222ii.pdf.

Between 2000 and 2005, with the funding of the DNA Expansion Programme, and the adding of arrestee samples, the number of *known* profiles in the NDNAD significantly grew. *See* ETHICS GROUP, *supra*, at 1.2. Yet despite this "massive increase," there was no "noticeable increase in the number of crimes detected using DNA . . . ." *National DNA Database: Submission to the Home Affairs Committee*, GENEWATCH UK, 7 (Jan. 2010), *available at* http://www.genewatch.org/uploads/

f03c6d66a9b354535738483c1c3d49e4/GWsub_Jan10.doc. "This is because the number of crimes detected is driven primarily by the numbers of crime scene DNA profiles loaded, not the number of individuals' profiles loaded or retained." *Id.*

To show the relationship at its starkest, consider that, at the end of 2007, both the UK and U.S. databases contained roughly 5 million offender profiles. However, because the UK database "had more than twice as many crime-scene profiles," it reported "more than *seven times* as many crime scene-to-offender matches." RAND, *supra*, at 14. The UK's use of ten versus thirteen loci accounts for some of the disparate effect, but not all. Rather, the empirical evidence clearly shows that efficient law enforcement is served by uploading crime scene samples, *not* arrestee samples. *Id.* at 18 ("In the United States, available evidence indicates that focusing on uploading proven offenders and crime-scene profiles has a greater impact on database matches ('investigations aided') than uploading suspected offenders at the point of arrest.").

2. Additional evidence is unavailable because the government refuses to permit qualified researchers access to the database.

The absence of reliable empirical evidence about the efficacy of arrestee DNA sampling points to a larger problem with measuring the impact of compulsory DNA sampling laws. As one scholar observed, "It has been assumed, but not

demonstrated, that the DNA data banks are effective on a broad scale in the manner intended. In fact, we know little about the outcomes of most 'hits'. . ." Frederick R. Bieber, *Turning Base Hits into Earned Runs: Improving the Effectiveness of Forensic Data Bank Programs*, 34 J.L. Med. & Ethics 222, 227 (2006); Matthew Gabriel, *Beyond the Cold Hit*, 38((2) J.L. Med. & Ethics 397 (2010). Even the "investigations aided" figure often cited by the government is misleading, in that "many times investigators have already identified a key suspect and . . . expect a database match." Bieber, *supra*, at 227.

Maryland, in issuing a 2011 report assessing the costs and benefits of arrestee sampling, should be applauded as one of few jurisdictions to disclose data. Maryland State Police Forensic Sciences Division, *Statewide DNA Database Report* (Apr. 2012), tinyurl.com/marylandreport [hereinafter Maryland Report]. Nonetheless, that report is woefully incomplete. Maryland reports that there have been 2,771 total hits since it joined CODIS; of those, 220 were hits to samples of arrestees as opposed to convicted persons, of which 73 led to arrests. *See* DNA Statistics, MARYLAND.GOV, http://www.goccp.maryland.gov/dna/statistics.php (last updated Jan. 22, 2013). Maryland provides no data on further dispositions. It does not explain why two-thirds of arrestee matches proved unfruitful. More importantly, it does not indicate whether any of those arrestees had a prior conviction and thus could constitutionally have been compelled to submit a DNA sample. Nor does it indicate whether any

matches occurred to demonstrably innocent persons. Unfortunately, the same shortcomings attend the reports of "success" in Virginia, Colorado, North Carolina, and California. *See* Nat'l Gov. Ass'n Br. 13-15; States Br. 9.

Perhaps the most thorough record of the impact of arrestee sampling was developed in the *Haskell* litigation in California, which contradicts the claim that arrestee sampling from 2008 to 2011 "doubled the crime-solving efficacy of California's database program." States Br. 8. While it is true that matches doubled in the period after arrestee sampling, it is *not* true that the relationship is causal. *Amici* fails to acknowledge another critical change: between January 2008 and July 2011, California doubled the number of *crime scene profiles* entered (from 19,393 to 41,337). That data also show, as reflected below, that even though the monthly average of added offender samples dropped by nearly one half from 2010 to 2012, the average number of crime scene stains stayed stable, and thus the number of hits actually *increased* during that period.

Average monthly...	**2010**	**2011**	**Jan-July 2012**
offender profiles uploaded	20,931	15,749	11,915
crime scene samples uploaded	608	592	602
hits	361	377	397

See Plaintiff-Appellants' Motion for Judicial Notice, *Haskell v. Harris*, No. 10-15152 (9th Cir. Aug. 31, 2012).

The summary nature of the available statistics mirrors the overall dearth of data about the efficacy of DNA databases. Open questions include: how many searches have been run; what fraction of those searches result in a "hit"; what fraction reveal a "near miss"; for what kinds of offenses are hits more or less likely; what kinds of offender criminal histories produce the most or least hits and to which types of crimes; how many times does a hit point to a person ultimately proven to be uninvolved with the offense; how many match to a person already identified through other evidence; how many times does a hit exculpate a previously identified suspect; how many hits lead to arrest, prosecution, or conviction; how many duplicate entries does the database contain; how many errors in database entry have been observed; what is the rate of usage from different states and from laboratories within those states; and so on.

Moreover, DNA databases can have a disparate impact on racial minorities. Issues of discrimination are beyond the scope of this brief. We underscore, however, that by refusing to release data about DNA databases, or document the discriminatory impact that has already occurred from arrestee sampling policies, Maryland has insufficiently responded to these serious concerns.

B. Convicted offender sampling achieves the government's crime-solving goals.

The available empirical evidence does not show that sampling arrestees materially enhances crime-solving. However, studies do suggest that convicted offender sampling can meet the government's interest in solving crimes.

1. Convicted offender sampling meets the government's interest.

No study directly addresses the single most important empirical question about arrestee DNA sampling: what fraction of arrestees whose DNA sample "hits" might already have qualified for database inclusion due to a prior (or contemporaneous) conviction. Maryland's own study suggests the answer is "almost all."

Maryland analyzed 2011 DNA database hits that resulted in convictions, and identified five different offender types that led to hits resulting in convictions. Maryland Report, *supra*, at 9. Significantly, *all five categories* describe offenders with prior convictions of some kind, ranging from quality of life offenses and controlled substance possession to robbery and rape. *Id.* In other words, although samples came in part from arrestees, in every case the offender also had prior convictions that could have rendered him or her eligible for inclusion in a DNA database on that basis, without resort to arrestee sampling. *See also* States Br. 10 (noting that California study revealed that 35% of

arrestees were not just convicted, but still on probation *at the time of the offense*).

This observation is further borne out by the facts of the instant case. Although it was an arrestee sample that ultimately entered the DNA database, King had *at least six prior convictions* at the time of his sentencing in 2010, as well as juvenile dispositions. Transcript of Sentencing Hrg. at 4, 13, 17-19, Maryland v. King, (Oct. 7, 2010) (No. K09-0807).

To be clear, Maryland's law does not currently require DNA samples from all convicts. However, in assessing the state's asserted interest, it is critical to observe that the state could have effectively enhanced crime-solving by relying only on convicted offender DNA sampling.

2. The anecdotal "preventable crime studies" are nonscientific and unreliable.

Although Maryland and the United States proffer an *ipse dixit* assertion that adding arrestee samples will serve their interest in solving crime, several of the *amici curiae* in support of Petitioner rely upon "preventable crime studies." *See, e.g.*, MCVRC Br. 11; L.A. Cnty. Br. 12; DNA Saves Br. 15; Nat'l Gov. Ass'n Br. 9-13. In these "studies," the government selects an offender, points to a prior date of felony arrest, and then claims that all subsequent criminal activity by that person could have been averted with arrestee DNA sampling. But these naked claims

suffer from a range of defects that undermine their authority.

First, all of the "studies" were written by law enforcement, and none has been subject to any form of scientific process, peer review or publication. Cumulatively, they feature 17 offenders – 8 from Chicago, 1 from Washington, 3 from Maryland, and 5 from Denver – but no information is provided about how those offenders were chosen. The three Maryland examples, for instance, purport to represent the roughly 286,000 individuals arrested in that state annually. *See Easy Access to FBI Arrest Statistics,* U.S. DEP'T OF JUST. OFF. OF JUV. JUST. AND DELINQ. PREVENTION, http://ojjdp.gov/ojstatbb/ezaucr/asp/ucr_display.asp (last visited Jan. 27, 2013). As researchers know, safeguarding against selection bias is a critically important precursor to reporting the significance of findings.

Second, these "studies" do not ask the pertinent question: does sampling of arrestees provide material benefits *beyond* convicted offender sampling? That question was probably not asked because the "studies" themselves suggest that convicted offender sampling is meeting the state's goals. *See* Appellant's Reply Br. at 13-14, *Haskell v. Harris*, No. 10-15152 (9th Cir. Apr. 1, 2010) (reviewing Denver "study" and noting that all cited offenders had prior convictions).

Indeed, *amici* for Petitioner observe as much. One writes, "it is rare that an individual commits a violent felony like rape or murder as his or her first

offense. Instead, the typical 'career path' of a criminal evolves from smaller petty crimes to more serious crimes." Nat'l Gov. Ass'n Br. 10. Likewise, Maryland reports that "77% of arrestees have prior arrests . . . and 61% have at least one prior felony conviction." Pet. Br. 24; *see also* DNA Saves Br. 10. It stands to reason that an even higher percentage have at least one prior conviction of *any* kind.

C. Arrestee sampling may in fact harm effective law enforcement.

Given resource constraints in the criminal justice system, arrestee DNA sampling comes at the cost of efficiently using DNA technology to identify and test crime scene evidence.

1. Arrestee sampling diverts resources from more valuable efforts, like increasing the quality and quantity of collected crime scene samples.

The popular images from film and television suggest that almost every crime scene is swept by experienced technicians. The reality is that very few crime scenes are checked carefully for evidence, and only a small fraction of evidence found from such scenes is submitted for analysis. Many jurisdictions do not employ dedicated professional crime scene investigators. *See, e.g.* Frank Horvath et al., *A National Survey of Police Policies and Practices Regarding the Criminal Investigation Process: Twenty-Five Years After RAND* 75-76 (Nov. 2001), https://www.ncjrs.gov/pdffiles1/nij/grants/202902.pdf

(noting studies documenting how police collect evidence in only a "small proportion" of cases, and that many departments do not have or routinely use trained evidence technicians).

One of the few surveys of the actual usage of forensics in criminal cases, led by Joseph Peterson and funded by the National Institute of Justice, randomly sampled over 4,000 crimes across five categories (aggravated assault, burglary, homicide, rape, and robbery) in five jurisdictions that represented city, county, and state practices. The researchers reached a number of troubling and relevant conclusions. Joseph Peterson et al., *Final Report: The Role and Impact of Forensic Evidence in the Criminal Justice Process*, NAT'L INST. OF JUST., (2010), https://www.ncjrs.gov/pdffiles1/nij/grants/231977.pdf [hereinafter Peterson study]. Namely, "a major finding of the study was that most evidence goes unexamined . . . ." *Id.* at 9.

First, the study found that physical evidence is not collected from crime scenes, even for serious offenses. Physical evidence was generated in only 20% of burglaries, 25% of robberies, and 30% of aggravated assaults. One-third of rape cases had no physical evidence collected. Only homicide offenses routinely produced physical evidence (81%). *Id.*

Second, even when crime scene evidence was collected, it was not always submitted for testing. Again, at 89%, homicide had by far the highest submission rate. In stark contrast, evidence was submitted for testing in only 32% of rape cases and

only 11-13% of burglaries, robberies, and assaults. Notably, even among these submissions, DNA tests constituted a negligible amount of analyses requested—less than 5% even for homicide and rape cases. *Id.*

Third, even if evidence was collected and submitted, there was a still smaller likelihood that the requested tests were actually conducted. Again, homicide, at 81%, had the highest completion rate. But examination of submitted evidence occurred in only 18% of rape cases, and in 9 to 10% of burglary, robbery, and aggravated assault cases.

The low rate of evidence collection is consistent with other studies on the quality and number of crime scene investigators available to examine an incident. As the National Academy of Sciences noted in its landmark 2009 report on forensic science, crime scene investigators have "varying levels of training and experience." *See* NAT'L RES. COUNCIL COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 35 (2009) [hereinafter NAS study]; *see also* Kevin Strom et al., *2007 Survey of Law Enforcement Evidence Processing: Final Report* 4-5 (Oct. 2009), https://www.ncjrs.gov/pdffiles1/nij/grants/228415.pdf [hereinafter Strom survey].

The current lack of resources and training has already impeded law enforcement. One study found that "about 40% of the unanalyzed [rape and homicide] cases were estimated to have contained

DNA evidence." *Id.* at 3-2. In addition, several people later exonerated by DNA testing could have been cleared by tests conducted when they were convicted, but the lab failed to identify that there was biological material to test.

In the case of Ulysses S. Charles, a man exonerated in Massachusetts after spending 17 years in prison, no DNA tests were conducted at the time of his trial. Instead, the prosecution's two experts testified that tests found no spermatozoa. Yet later DNA tests readily identified spermatozoa on the evidence. *See* Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 80 (2009). Or consider Larry Peterson, who was exonerated in New Jersey when, despite the lab's report "that there was no semen in the victim's rape kit" at the time of trial, post-conviction analysis identified ample DNA material for testing. *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 109-10 (2011).

Or consider the case of Marlon Pendleton, a man who spent 10 years in prison before DNA exonerated him. The lab analyst had claimed at the time of his trial that there was insufficient material to test. *See Know the Cases: Marlon Pendleton*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Marlon_Pendleton.php (last visited Jan. 27, 2013).

Lack of collection and proper testing of physical evidence would not be troubling if most offenses would be unlikely to produce such evidence, or if it

tended to have little effect on case clearance rates. But studies have shown that training and equipping crime scene investigators can have dramatic results. For instance, one randomized study investigating burglary and automobile theft in five communities using DNA technologies found that the arrest and prosecution rate doubled when scenes were properly checked for biological evidence. JOHN K. ROMAN ET AL., THE DNA FIELD EXPERIMENT: COST EFFECTIVENESS ANALYSIS OF THE USE OF DNA IN THE INVESTIGATION OF HIGH-VOLUME CRIMES 4 (2008). The Peterson study likewise found a strong correlation between collection of physical evidence and the likelihood of arrest and disposition. Peterson study, *supra*, at 8; *see also* Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 Cal. L. Rev. 721, 735 (2007) (reporting successes solving property offenses in U.K.).

It is lamentable – although not inevitable – that "[v]ery few reported crime incidents had forensic evidence that linked a suspect to the crime scene and/or victim (~2% of all cases, 6% of cases with crime scene evidence, and 12% of cases with examined evidence)." Peterson Study, *supra* at 8. Indeed, given that the majority of crime victims know their offenders,[2] the power of DNA evidence may more often rest in its ability to corroborate or

---

[2] For instance, in one study, 79% of rape victims described the assailant as a non-stranger. Jennifer L. Truman & Michael R. Rand, *Crime Victimization, 2009*, U.S. DEP'T OF JUST. BUREAU OF JUST. STATS. 7 tbl.7 (Oct. 2010). http://bjs.ojp.usdoj.gov/content/pub/pdf/cv09.pdf.

affirm a victim's account, rather than in its capacity to identify a stranger perpetrator.

2. Sampling of arrestees exacerbates the problems of erroneous duplicate entries and backlogs.

The low submission and examination rates of crime scene evidence point toward another impediment to the efficient use of DNA databases: backlogs. Peterson study, *supra*, at 10-11. Maryland cites "an interest in solving crimes as expeditiously as possible," Pet. Br. 23, but its effort to process arrestee samples comes at the expense of examining valuable samples from unsolved crime scenes. Having expanded DNA collection to arrestees, Maryland – like many other jurisdictions – has been no stranger to backlogs in recent years. *See* Chris Gordon, *DNA Backlog in Prince George's County*, NBCWASHINGTON.COM (July 16, 2012, 9:39 PM) (describing backlog in Prince George's County, Maryland of "654 DNA cases, including rapes, assaults and other violent crimes.").

Backlogs, typically defined as a delay in DNA testing greater than 30 days, impede the effective administration of justice in several ways. Clogs can slow casework processing times, so that the testing of evidence related to incidents takes months or years to complete. Such delays may render identification and arrest of a suspect more difficult, and defer the exculpation of a wrongly accused person. Delays can also harm efficient analysis of convicted offender samples, so that demonstrably

guilty offenders may be sentenced or released without the state's awareness of possible other offenses.

Arrestee sampling programs exacerbate these backlogs. DNA testing constitutes only a third of the work requested of public crime laboratories, but it accounts for 75% of total backlogs in case processing. Andrea M. Burch, Matthew R. Durose, & Kelly A. Walsh, *Census of Publicly Funded Forensic Crime Laboratories*, DEP'T OF JUST. BUREAU OF JUST. STATS. 4 (2009), http://bjs.ojp.usdoj.gov/content/pub/pdf/cpffcl09.pdf [hereinafter 2009 Census].

Backlogs in convicted offender processing in turn cause congestion in crime scene sample processing. Of the 4.1 million received and completed requests for forensic services in 2009, 8% were for DNA analysis in casework and 26% were to process convicted offender and arrestee samples. But of the 1.1 million backlogged requests, 42% were to process known offender samples and 34% were for casework DNA samples. *Id.* at 4 tbls.4 & 5

One example of the costs of such delays is the case of a Florida man named Cody Davis. Davis was misidentified by eyewitnesses to a robbery, but as a result of backlogs, the ski mask worn by the robber was not tested before his trial. Four months after his trial, DNA results cleared Davis, who was exonerated in post-conviction proceedings. *See Know the Cases: Cody Davis*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Cody_Davis.php (last visited Jan. 27, 2013).

Moreover, given the probability that many arrested offenders already have samples in the database from prior convictions, the number of duplicate entries is likely to explode. Julie Samuels *et al.*, URB. INST., *Collecting DNA From Arrestees: Implementation Lessons* 22 (2012) ("[L]aws rarely consider the logistical issues . . . ."). Because the UK makes data available, it is known from experience that duplicate entries impede database efficiency. The UK government admitted that over 500,000 names in its then 4 million person database were "false, misspelt, or incorrect," and that roughly one in seven entries was a duplicate. Marie Woolf, *DNA database chaos with 500,000 false or misspelt entries*, THE (U.K.) INDEPENDENT, Aug. 26, 2007, http://www.independent.co.uk/news/uk/politics/dna-database-chaos-with-500000-false-or-misspelt-entries-463055.html.

Government representatives in the U.S. have acknowledged the problem of duplicate entries in court pleadings in litigation seeking to explain the existence of pairwise matches in databases, discussed *infra* p. 35. Jason Felch & Maura Dolan, *DNA: Genes as Evidence: FBI Resists Scrutiny of 'Matches'*, L.A. TIMES, July 20, 2008, http://articles.latimes.com/2008/jul/20/local/me-dna20/4 [hereinafter Felch, *FBI Resists*].

ARRESTEE SAMPLING IS MORE LIKELY TO HARM THAN HELP THE INNOCENT.

Maryland asserts that this database expansion "spares innocent persons from becoming mistaken suspects." Pet. Brief 10. Maryland provides no evidence to support this dubious proposition.

A. Arrestee sampling is not necessary to exonerate the innocent.

No party has disputed that a person's DNA may be examined *with individualized suspicion*. Such a comparison unquestionably serves the ends of justice. *See* Edward Connors et al., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, U.S. DEP'T OF JUST., xxviii-xxix, 20 (1996), https://www.ncjrs.gov/pdffiles/dnaevid.pdf (reporting the results of 1995 DNA laboratory survey of 10,000 FBI cases and 10,000 state, local, and private lab cases that found 25% to 30% exclusion rate of "primary suspects" pre-trial); *see also* William S. Sessions, *DNA Evidence and the Death Penalty*, JURIST (May 30, 2007), *available at* http://jurist.org/forum/2007/05/dna-evidence-and-death-penalty.php (noting that statistics have since remained roughly identical).

Maryland thus argues suspicionless arrestee sampling is necessary to protect the innocent in one situation: when a case contains biological evidence that excludes the suspect, and yet the government still pursues prosecution. In such instances, a DNA

database search may support a claim of innocence. One of the authors of this *amicus* brief studied the first 250 DNA exonerations and found that in 45% of the DNA exonerations (112 of 250 cases), post-conviction DNA testing identified the perpetrator, usually through a cold hit in the CODIS database. GARRETT, CONVICTING THE INNOCENT, *supra*, at 5. Certainly, finding a database match adds icing to the cake by showing that not only is the suspect excluded by the DNA test, but also that another person is included. But there are two reasons why it is disingenuous to rely on this scenario as a basis for upholding arrestee sampling.

First, it is odd to suggest that a state's reluctance to exonerate a suspect based on its own exculpatory DNA tests supplies it with authority to order DNA tests from a wide swath of innocent arrestees. The case of David Allen Jones, popularly cited as an illustration of the benefits of arrestee sampling, *see, e.g.*, DNA Saves Br. 16, illustrates this irony.

Jones, a mentally disabled janitor, was convicted in 1995 of three murders. A complete recording of his entire interrogation would have made clear that police exerted improper influence during and after his contaminated false confession. Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051, 1079 (2010). Straightforward blood typing had excluded David Allen Jones, and hairs found at the scenes did not match him either—but he was convicted anyway, despite his manifest mental limitations. Jones was exonerated by post-

conviction DNA tests after spending nine years in prison.

Jones was wrongfully convicted, not because the state failed to engage in suspicionless DNA searches, but because the state discounted the ample evidence that Jones was not the proper suspect, including the blood test that excluded him. At any rate, the later DNA tests should have sufficed to exonerate him, even if the actual perpetrator had not been found. Moreover, the true perpetrator in that case *had* been convicted of a felony prior to the date of Jones's conviction, and therefore would have been included in a convicted offender DNA database without resort to arrestee sampling. *Haskell v. Harris*, 669 F.3d 1049, 1077 (9th Cir.) (Fletcher, J., dissenting), *reh'g granted en banc*, 686 F.3d 1121 (9th Cir. 2012). Many other examples of arrestee success stories likewise include people convicted of serious crimes who would have been included in DNA databases regardless. Such misleading examples should be discounted.

Second, despite this professed interest in exoneration, Maryland and other jurisdictions have failed to implement the safeguards necessary to truly protect the innocent. Commendably, Maryland is one of nine states that does allow defense access to DNA databases for exculpatory searches. But in most jurisdictions, there is no such access. *See generally* Ethan Bronner, *Lawyers, Saying DNA Cleared Inmate, Pursue Access to Data*, N.Y. TIMES, Jan. 3, 2013, http://www.nytimes.com/2013/01/04/

us/lawyers-saying-dna-cleared-inmate-pursue-access-to-data.html?hp&_r=1& (listing states); *see also* Murphy, *The New Forensics*, *supra*, at 790-91 (describing exculpation of capital defendant through defense-requested database search).

Moreover, although Maryland, like all but one state, provides for post-conviction access to DNA testing, *see, e.g.*, Md. Code Ann., Crim. Proc. § 8-201 (2009), Maryland is *not* one of the few jurisdictions that have initiated DNA reviews of closed cases. Given that such reviews have uncovered surprising numbers of wrongful convictions, this is precisely the kind of random, suspicionless DNA testing that demonstrably serves justice. *See, e.g.* Frank Green, *Results of Post-Conviction DNA Testing to be Released*, RICHMOND TIMES-DISPATCH, May 10, 2012 (describing roughly 80 exonerations of this kind from Virginia's post-conviction testing project). Yet jurisdictions have not invested a small fraction of what they spend on CODIS entries in order to test evidence from cold cases.

In fact, few jurisdictions have a routine protocol for responding to DNA matches even when they are made. *See* Maura Dolan & Jason Felch, *DNA: Genes as Evidence: The Danger of DNA: It Isn't Perfect*, L.A. TIMES, Dec. 26, 2008, at 1 ("'Hundreds of DNA database hits languish without any follow up by law enforcement or prosecutors'") [hereinafter Dolan, *It Isn't Perfect*]. There are many more hits in cold cases than is commonly known, but no information is collected on them. Many agencies do not respond to them, because they have no protocol for reopening

"closed" cases. Indeed, prosecutors may never learn of the DNA match, nor may the attorneys who might be able to prove innocence using the information about the hit. *See Postconviction DNA Testing Assistance Program Roundtable Summary*, NAT'L INST. OF JUST. (Oct. 21, 2011), http://www.nij.gov/topics/forensics/postconviction/roundtable/welcome.htm.

Finally, Maryland and others have refused the call of independent researchers to allow controlled access to the DNA database in order to assess the efficacy of DNA programs, ensure integrity of entries, and verify government claims related to the significance of a DNA match. D.E. Krane et al., *Time for DNA Disclosure*, 326 SCIENCE 1361 (2009). The federal government has even threatened to cut off states willing to allow such access. *See* Felch, *FBI Resists*, *supra*. *But see* Sarah M. Ruby, *Checking the Math: Government Secrecy and DNA Databases*, 6 I/S J. of L. & Pol'y 257, 281 (2010) (noting that "the FBI's director of CODIS 'advised state officials to raise the risk of expulsion with a judge but told the officials that expulsion was unlikely to actually happen'").

B. Forensic DNA analysis can, and has, resulted in false matches and wrongful convictions.

Without question, forensic DNA testing has achieved great success both in convicting the guilty and exonerating the innocent. But Maryland and *amici* underplay the risks that inclusion in DNA

databases pose to innocent persons. DNA successes have not come untainted by failure.

1. The subjective nature of forensic DNA analysis can lead to false database hits.

As three Justices of this Court have recognized, "DNA testing—even when performed with modern STR technology, and even when performed in perfect accordance with protocols—often fails to provide 'absolute proof of anything." *District Atty's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 80-81 (2009) (Alito, J., concurring). The poor condition of many crime scene samples renders interpretation of a crime scene sample a highly subjective task. *See generally* Erin Murphy, *The Art in the Science of DNA: A Layperson's Guide to the Subjectivity Inherent in Forensic DNA Typing*, 58 Emory L.J. 489, 501 (2008) ("The job of the DNA analyst . . . relies largely on reasoning abilities, processes of elimination, subjective judgment calls, and inferences; it is not a mathematically certain, objective enterprise.").

A recent study confirms this basic truth. Itiel Dror & Greg Hampikian, *Subjectivity and bias in forensic DNA mixture interpretation*, 51 SCI. & JUST. 204 (2011). Researchers provided seventeen experienced DNA examiners with the records of a mixture analysis from a Georgia criminal case in which the defendant was convicted based in part on DNA evidence. *Id.* at 204-05. Whereas the original examiners determined that the suspect could not be

excluded as a potential source of the sample, the seventeen examiners varied wildly. Twelve excluded the suspect, four found the test inconclusive, and only one concurred in the inclusion. *Id.* The study concluded that "DNA mixture interpretation has subjective elements and may be susceptible to bias and other contextual influences." *Id.; accord* John M. Butler & Bruce M. McCord, *Advanced Topics in STR DNA Analysis: STR Mixture Interpretation*, American Academy of Sciences Annual Meeting (2006) http://www.cstl.nist.gov/strbase/pub_pres/AAFS2006_mixtures.pdf (attributing to Peter Gill, a pioneer in forensic DNA: "If you show 10 colleagues a mixture, you will probably end up with 10 different answers").

Such mistakes are not academic; they have led to false attributions. In one case, an analyst interpreted a swab collected from a rape victim, and input the profile of the putative perpetrator into the database. *See* William C. Thompson, *The Myth of Infallibility*, *in* GENETIC EXPLANATIONS: SENSE AND NONSENSE 232 (Sheldon Krimsky & Jeremy Gruber eds., 2012) [hereinafter Thompson, *The Myth*]. When a search produced a match to a local man, police investigated, but found evidence of innocence. Further investigation revealed the analyst inaccurately interpreted the sample, even assuming a mixture between a male and female when in fact it was between two males. *Id.* Interpretive difficulty can also arise with regard to statistical aspects of DNA analysis, especially with samples including material from multiple persons or very low template. *See generally* William C. Thompson et al., *Forensic*

DNA Statistics: Still Controversial in Some Cases, 36 THE CHAMPION 10, 12-23 (Dec. 2012).

2. False attributions can occur as a result of contamination, transfer, or deliberate malfeasance.

Contamination, inadvertent transfer, and deliberate malfeasance have also given rise to an abundant catalog of mistakes. One leading scholar has collected a list of common errors, along with illustrative case studies. *See* Thompson, *The Myth*, *supra*. At least three individuals subsequently exonerated by post-conviction DNA tests were first wrongly convicted based on faulty DNA testing or analysis. GARRETT, CONVICTING THE INNOCENT, *supra*, at 100-102.

False database matches may arise from cross-contamination of samples. Such cases have been reported in Washington, California, New Jersey, and Florida, as well as in Australia, New Zealand, and Scotland. Thompson, *The Myth*, *supra*, at 228. In one case, a database match identified a man who would have been a toddler at the time of the offense; the laboratory had conducted a training exercise using his DNA that accidentally contaminated the crime samples. *Id.* In another famous case, police hunted across Europe for a suspect that surfaced in a wide assortment of crimes ranging from murder to larceny, only to realize that the DNA belonged to an employee of the firm that manufactured swabs used to collect evidence. *Id.*

Given the sensitivity of DNA testing, contamination can be as simple as "someone sneezes or coughs over the evidence or touches his/her mouth, nose, or other part of the face and then touches the area that may contain the DNA to be tested." Nat'l Comm. on the Future of DNA Evidence, U.S. Dep't of Just., *What Every Law Enforcement Officer Should Know about DNA Evidence* (1990), https://www.ncjrs.gov/pdffiles1/nij/bc000614.pdf. With high sensitivity methods like low copy number testing, which produce results from as few as fifteen cells, it can take less than that.

Errors occur due to accidental mislabeling of samples. For example, in 2011 the Las Vegas Police Department admitted to its *second* sample switch – this one resulting in the wrongful incarceration of a man for four years. Jackie Valley, *Metro reviewing DNA cases after error led to wrongful conviction*, LAS VEGAS SUN, July 7, 2011. Labs have also confronted deliberate falsification of DNA tests and cheating on proficiency tests. See 4 Mod. Sci. Evidence § 31:15 (2012-13 edition) (listing errors involving DNA analysis) [hereinafter MSE]. Records from a three year period of one crime lab in California disclosed more than two-dozen cases with errors, including contamination by staffers, cross-contamination with other samples, and accidental switching of samples. *See* Dolan, *It isn't Perfect*, *supra* (additionally noting that one scholar "estimated the rate of false DNA matches at about 1 in 1,000"). Sample switches have also falsely implicated innocent persons in California

and Pennsylvania. Thompson, *The Myth*, *supra*, at 230-31.

In addition, DNA can inadvertently transfer. Studies show that if A shakes hands with B, and then B shakes hands with C, it is possible for A's cells to transfer to C, leaving the false impression that A and C came into direct contact. Alex Lowe et al., *The propensity of individuals to deposit DNA and secondary transfer of low level DNA from individuals to inert surfaces*, 129 Forensic Sci. Int'l 25, 33 (2002) (reporting that in certain conditions, a secondary profile might appear on an object the person never touched, even while the primary profile of the person who handled the object does not appear). Similarly, studies have shown that machine washing can transfer spermatozoa onto "clean" articles of clothing. E. Kafarowski et al., *The retention and transfer of spermatozoa in clothing by machine washing*, 29 Canadian Soc. Forensic Sci. J. 7 (1996).

One recent dramatic example involved a high profile investigation into the murder of a Yale University graduate student. Police recovered DNA material from intimate clothing of the victim, who was found in a wall cavity, in addition to material clearly attributable to the later-convicted killer. A search in the DNA database uncovered a match to a convicted offender, but investigation established that he had died years before the attack. Further inquiry revealed that the offender had built the cavity as part of a construction team. His biological material had apparently been preserved for years, transferring to various parts of the victim when the

killer forced her body into the shaft. *See* MSE § 31:13, at 148.

Unfortunately, the rate of error and false attribution among laboratories is not systematically recorded, and thus remains unknown. Yet as the National Academy of Sciences observed, "although DNA analysis is considered the most reliable forensic tool available today, laboratories nonetheless can make errors . . . such as mislabeling samples, losing samples, or misinterpreting the data." NAS Study, *supra*, at 47.

One way to gauge reliability would be to conduct regular tests and make public the results. But although 97% of public laboratories conduct some form of proficiency testing, they are rarely blind (in that the analyst does not know they are being tested), and rarely publicly reported. 2009 Census, *supra*, at 8 fig.4. Lamentably, from 2002 to 2009, the percentage of tests involving random case reanalysis dropped from 54% to 36% and the rate of blind examination dropped from 26% to 10%. *Id.*

The lack of oversight of crime laboratories has continued despite recurring scandals. Almost every major laboratory in the United States has endured controversy related to the performance of its duties. *See* MSE, *supra*, at § 31:15 (listing errors involving DNA analysis). Perhaps the most recent involves the New York City Medical Examiner's Office, one of the nation's most respected crime laboratories. After it was revealed that a DNA analyst had failed basic evidentiary tests in rape cases, the lab undertook a

review of all of her prior work. In the course of that review, they discovered pieces of evidence stored in the wrong cases, indicating at minimum that the analyst had breached protocol and conducted tests on multiple cases simultaneously. *See* Joseph Goldstein, *New York Examines Over 800 Rape Cases for Possible Mishandling of Evidence*, N.Y. TIMES, Jan. 10, 2013.

Failure to ensure adequate quality control starts at the federal level. Although Congress conditioned lab funding through the Paul Coverdell grant program on a requirement that states ensure independent entities exist to investigate allegations of serious negligence or misconduct at laboratories, the Department of Justice did not enforce it. Yet, according to a report by the Inspector General on the issue, "[i]ndependent external investigations of allegations of laboratory wrongdoing can provide an important safeguard to reduce problems created by inadequate forensic analysis." *Oversight of the Department of Justice's Forensic Grant Programs: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2008) (statement of Glenn A. Fine, Inspector General, U.S. Department of Justice). The report further found many recipients did not have independent audit functions and even named auditors "had not even been previously informed that their entities had been named to conduct independent external investigations." *Id.* at 6.

3. Expanded suspect databases elevate the risk of adventitious, or false positive, matches.

"As DNA-databases become larger, the chance of finding adventitious matches also increases, especially with partial and mixed profiles...." *See* ENFSI DNA Working Group, *DNA-Database Management: Review and Recommendations*, ENFSI, at 27 (April 2012), http://www.enfsi.eu/sites/default/files/documents/enfsi_document_on_dna-database_management_2012_0.pdf [hereinafter ENFSI]. An "adventitious match" is the term used to describe a match between a crime scene sample and a known offender that arises as a result of chance, rather than because the offender is the source of the sample. Though small, the adventitious match risk is not negligible. Moreover, since the FBI has embraced a new method known as familial or partial match searching, explained *infra* p. 37, the risk of adventitious matches has increased. Thompson, *The Myth*, *supra*, 244. Although the FBI does not release match rates, the British Home Office has reported that over a quarter of its database searches result in hits to more than one person. *Id.*

The European Network of Forensic Science Institutes set forth recommendations to address the risk of adventitious matches. *See* ENFSI, *supra*. They estimate the probability of such a match as a function of the size of the database, the random match probability of the crime scene stain, and the number of searches conducted. ENFSI at 28. As

shown below, they diagram one "theoretical example of a DNA-database which contains 4 million reference DNA profiles to which 70,000 crime related DNA-profiles of difference random match probabilities are compared." *Id.*

DNA-database size	RMP of crime stain	Number of searches	Expected number of adventitious matches
4 million	1: 10,000,000,000	50,000	20
	1: 1,000,000,000	10,000	40
	1: 100,000,000	5000	200
	1: 10,000,000	3000	1200
	1: 1,000,000	2000	8000

The presence of a relative of the perpetrator in a database may also affect the probability of a chance database match. That is because "the match probabilities between relatives are higher than the random match probability." *Id.* A random match probability of one in a billion may reduce as low as one in ten thousand if a full sibling is also in the database. *Id.* ENFSI created the projection below, but notes that "[t]he exact expected number of adventitious matches due to the presence of relatives in a DNA-database is impossible to calculate without knowing the numbers and types of relatives present." *Id.*

Relationship	Match Probability
No relationship	1 in 1 billion
First cousin	1 in 100 million
Half-sib or uncle/nephew	1 in 10 million
Parent or child	1 in 1 million
Full-sib	1 in 10,000

Maryland is no stranger to adventitious matching. In 2007, a court, concerned about the possibility of matches *within* the database, ordered a search for pairwise matches. From the (relatively) small 30,000 person Maryland database, the search produced 32 DNA matches at 9 or more loci, including three exact matches at 13 of 13 loci. Maryland claimed that these came from three sets of identical twins, but before further discovery occurred the state dismissed the charges.

The risk of coincidental matches is sometimes dismissed as trivial because DNA match probabilities can, under ideal circumstances, be extremely low. *See* JOHN M. BUTLER, FUNDAMENTALS OF FORENSIC DNA TYPING 255 (2009) (noting random match probabilities commonly are "rarer than one in a trillion among unrelated individuals"). But match probabilities in forensic cases are often much higher because the profiles recovered from crime scenes are incomplete or contain mixtures of DNA from more than one individual. Thompson, *The Myth*, *supra*, at 240-45. Moreover, the risk of a coincidence depends not just on the probability of a single match, but also on the number of opportunities that exist to find such a match. *See* Testimony of Sir Alec Jeffreys, HOME

AFFAIRS COMMITTEE, THE NATIONAL DNA DATABASE (HOUSE OF COMMONS), EIGHTH REPORT, 2009-10, HC 222-II, at 24-32 (U.K.) (calling the match probability "to some extent, a meaningless number" and noting that the chance of winning the lottery are also low "but every week someone wins the National Lottery."); *see also* Thompson, *The Myth*, *supra*, at 244 ("[I]n a system in which thousands of evidentiary profiles with frequencies on the order of 1 in 10 billion are searched each year against millions of database profiles, coincidental matches will inevitably be found.").

C. Forensic DNA technology continues to evolve and new methods are initiated without direct judicial oversight.

Arrestee DNA typing may also harm, rather than help, innocent persons because of the potentially intrusive nature of rapidly evolving technological developments.

1. Law enforcement currently uses the CODIS loci to identify offenders' relatives.

Proponents of expansive compulsory DNA sampling argue that the current CODIS loci do not directly reveal any sensitive traits. Although our understanding of the workings of the genome is still incomplete, at this time that assertion is true. However, law enforcement can and does use genetic material to draw conclusions about the DNA profiles of offenders' relatives.

In 2006, the FBI changed its policy to allow partial match searches of the DNA database, also known as "familial searches." *See* Bulletin from the Combined DNA Index System, *Interim Plan for Release of Information in the Event of a "Partial Match" at NDIS* (July 20, 2006) (Bulletin No. BT072006). In a familial search, analysts look not for an exact match between the crime scene sample and a known offender, but rather for a partial match. Such partial matches are useful because they may indicate that the perpetrator is a relative of the known offender. Thus, investigators can pursue those relatives – often by surreptitiously taking a DNA sample – to determine whether any match the crime scene sample. *See generally* Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 Mich. L. Rev. 291, 292-93 (2010).

It is impossible to know exactly how many jurisdictions engage in familial matching because almost all do so informally rather than through legislative or executive order. One survey found at least fifteen states engage in the practice. *Id.* at 302. Maryland is one of two jurisdictions to forbid familial searches, Md. Code Pub. Safety § 2-506(d), although the language of their statute leaves open one common alternative approach, which is to allow reporting of *inadvertent* partial matches. Notably, familial search methods are less effective absent additional testing of DNA samples beyond the CODIS loci. Murphy, *Relative Doubt*, *supra*, at 343; *see also* Joseph Goldstein & J. David Goodman, *3*

Years After Inception, A DNA Technique Yields Little Success for the Police, N.Y. Times, Jan. 27, 2013.

Critics have charged that familial searching works an end-run around database eligibility laws, because they allow investigators to use the DNA database to draw inferences about the DNA profile of innocent relatives. Murphy, *Relative Doubt*, *supra*, at 305-06. Familial searches also create arbitrary suspect pools, because they concentrate attention on relatives of convicted offenders and ignore persons unrelated to someone in the database. *Id.* Finally, such searches may disrupt family harmony by revealing adoptions, surrogacy, false attributions of paternity, or other sensitive information. *Id.* at 315.

2. Scientists have announced new genetic tests that determine age, bioancestry, eye color, hair color, facial structure, and other visible characteristics.

The secrets that a DNA sample can unlock go beyond familial associations. For example, a research team that included *amici* to this Court, recently announced development of a forensic chip that discerns "biogeographic ancestry and externally visible characteristics" from DNA samples. Brendan Keating *et al.*, *First all-in-one diagnostic tool for DNA intelligence: genome-wide inference of biogeographic ancestry, appearance, relatedness, and sex with the Identitas v1 Forensic Chip*, INT. J. LEGAL MED. (Nov. 13, 2012) (coauthored by Genetics *amici* Bruce Budowle, Kenneth Kidd, and Timothy

Spector). The chip is the "first commercially available all-in-one tool dedicated to the concept of developing intelligence leads based on DNA." *Id.* Using different markers than the CODIS loci, it predicts sex, relatedness, eye color, hair color, and continental ancestry. *Id.* at 2; *see also* Susan Walsh et al., IrisPlex: *A sensitive DNA tool for accurate prediction of blue and brown eye color in the absence of ancestry information*, 5 FORENSIC SCI. INT'L GENETICS 170 (2011) (proclaiming a "new era of 'DNA intelligence' is arriving in forensic biology). Law enforcement has already used bioancestry data to draw inferences about skin tone, *see* Dana Hawkins Simons, *Getting DNA to bear witness*, 134 (22) U.S. NEWS 50 (July 2003), and current DNA tests can project age within ten years, D. Zubakov et al., *Estimating human age from T-cell rearrangements*, 20(22) Current Biology (2010). Continued efforts are under way to identify markers associated with "freckles, moles, curly hair, skin color, earlobe shape, body height," and "facial shape features." Keating, *supra*, at 11.

Moreover, as a recent press report revealed, because of relatedness, seemingly opaque genetic information can be "reverse engineered" to reveal identity. *See* Gina Kolata, *Web Hunt for DNA Sequences Leaves Privacy Compromised*, N.Y. Times, Jan. 17, 2013. Forensic researchers have long been aware of this fact: early studies showed that a common form of forensic DNA testing that examines the male chromosome ("Y-STR testing") can point investigators to the donor's surname (which like the chromosome, travels patrilineally in our culture).

Uta-Dorothee Immel et al., *Y-chromosomal STR haplotype analysis reveals surname-associated strata in the East-German population*, 14 Eur. J. Hum. Genetics 577, 580 (2006); *see also* FAMILY TREE DNA, www.familytreedna.com (last visited Jan. 27, 2013) (website offering services to probe ancestry).

Given the rapid pace of change with regard to DNA technology, it is certain that the unimaginable today will be available tomorrow. A quick perusal of recent grants by the National Institute of Justice provides a glimpse of the horizon. Awards include studies of: next generation sequencing methods that conduct multiple kinds of DNA tests simultaneously; methods to glean DNA profiles from miniscule quantities of biological material; tools to improve familial search systems; and "Genome-Wide forensic DNA Analysis" that would "link relatives as distant as third cousins with high confidence." *See generally* Nat'l Inst. of Just., *Fiscal Year 2012 Awards*, http://nij.gov/nij/funding/awards/2012.htm (last visited January 26, 2013).

3. New DNA tests and technologies typically enter service without direct judicial or legislative oversight.

Finally, as DNA technology has evolved, almost all new techniques have been implemented without express legislative permission or judicial oversight. Familial searching blossomed as a result of an FBI rule change, and the decision whether to engage the practice is often made on a lab-by-lab basis. Murphy, *Relative Doubt*, *supra*, at 292-93. Labs also began Y-

STR testing the male chromosome with little judicial intervention. Finally, the FBI is poised to introduce new CODIS loci without seeking judicial pre-authorization. *See* D.R. Hares, *Expanding the CODIS Core Loci in the United States*, Forensic Sci. Int. Genet. 6 (2012), e52-e54.

CONCLUSION

Arrestee sampling does not increase investigative efficiency, and may in fact diminish it. Moreover, arrestee sampling is not necessary to protect the innocent, but rather endangers privacy and risks false accusation.

Respectfully submitted.

BRANDON L. GARRETT
UNIVERSITY OF VIRGINIA SCHOOL OF LAW
580 Massie Road
Charlottesville, VA 22902
(434) 961-2513

ERIN MURPHY
NEW YORK UNIVERSITY SCHOOL OF LAW
40 Washington Square
New York, NY 10012
(212) 998-6672
erin.murphy@nyu.edu

February 2013

Appendix

List of amici curiae

Darryl K. Brown
O.M. Vicars Professor of Law &
E. James Kelly, Jr. – Class of 1965 Research
Professor of Law
University of Virginia School of Law
Charlottesville, Virginia

Brandon L. Garrett
Roy L. & Rosamund Woodruff Morgan
Professor of Law
University of Virginia School of Law
Charlottesville, Virginia

Paul C. Giannelli
Albert J. Weatherhead III and
Richard W. Weatherhead Professor,
Distinguished University Professor
Case Western Reserve University
School of Law
Cleveland, Ohio

Bernard E. Harcourt
Julius Kreeger Professor of Law and Professor and
Chair of the Political Science Department
The University of Chicago
Chicago, Illinois

David Jaros
Assistant Professor of Law
University of Baltimore School of Law
Baltimore, Maryland

Jennifer F. Laurin
Assistant Professor of Law
University of Texas School of Law
Austin, Texas

William G. McLain III
Associate Professor of Law
University of the District of Columbia
David A. Clarke School of Law
Washington, District of Columbia

Daniel S. Medwed
Professor of Law
Northeastern University
School of Law
Boston, Massachusetts

Jennifer L. Mnookin
Vice Dean and Professor of Law
University of California, Los Angeles
School of Law
Los Angeles, California

Jane Campbell Moriarty
Carol Los Mansmann Chair in Faculty Scholarship
Professor of Law and Associate Dean for Faculty Scholarship
Duquesne University School of Law
Pittsburgh, Pennsylvania

Erin Murphy
Professor of Law
New York University School of Law
New York, New York

Andrea Roth
Assistant Professor of Law
University of California, Berkeley
School of Law
Berkeley, California

Colin Starger
Assistant Professor
University of Baltimore School of Law
Baltimore, Maryland

William C. Thompson
Professor of Criminology, Law & Society
and Psychology & Social Behavior and Law
University of California, Irvine
Irvine, California

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
DEC 28 2012
OFFICE OF THE CLERK

No. 12-207

In The
Supreme Court of the United States

MARYLAND,

Petitioner,

v.

ALONZO JAY KING, JR.,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of Maryland

BRIEF OF GENETICS, GENOMICS AND FORENSIC SCIENCE RESEARCHERS AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

MICHAEL L. FOREMAN
Counsel of Record
The Pennsylvania State University
School of Law
329 Innovation Boulevard, Suite 118
State College, PA 16803
(814) 865-3832
mlf25@psu.edu

December 28, 2012
Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. DNA consists of coding and noncoding sequences	5
A. The human genome consists of over three billion base pairs	5
B. The exons of genes code for proteins and RNAs	7
C. There are many types of noncoding DNA	12
II. CODIS loci are one type of repetitive DNA useful for human identification	14
III. Variations in CODIS loci are not known to be causally related to physical or behavioral traits	17
A. CODIS loci are not known to be translated into proteins	18
B. CODIS loci are not known to be transcribed into regulatory ncRNA, but one intronic CODIS locus has been shown to have some regulatory effect	19

TABLE OF CONTENTS – Continued

Page

IV. Variations in CODIS loci could be correlated with physical or behavioral traits, but no substantial correlations have been observed in forensically relevant populations, and database administrators, employers, or health insurers are not likely to find correlations useful for disease diagnosis or prediction 20

V. Estimates of the proportion of the genome that is "junk" are largely irrelevant to the privacy interests implicated by CODIS loci 25

A. In genetics, "junk DNA" denotes sequences that lie outside of genes and that are not under detectable selective pressure: that such DNA exists is not in doubt 27

B. "Junk" DNA sequences could be biologically useful or interesting yet not be useful for disease diagnosis or prediction..... 28

C. ENCODE data do not reveal that anywhere near 80% of the genome contains medically relevant information..... 30

VI. The CODIS loci can provide information about specific family relationships as well as weak information about racial or ethnic background 33

CONCLUSION..... 37

TABLE OF CONTENTS – Continued

Page

Appendix A

Identification of *Amici* .....App. 1

Appendix B

Some Studies Reporting Diseases Associated with Fingerprint Features.....App. 8

TABLE OF AUTHORITIES

Page

CASES

King v. State, 42 A.3d 549 (Md. 2012), *cert. granted sub nom. Maryland v. King*, No. 12-207 (U.S. Nov. 9, 2012).....24

State v. Abernathy, No. 3599-9-11 (Super. Ct., June 1, 2012), *app. pending*, Vt. No. 2012-102 24

STATUTES AND REGULATIONS

Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff.....4

OTHER AUTHORITIES

Albanèse, Véronique, et al., *Quantitative Effects on Gene Silencing by Allelic Variation at a Tetranucleotide Microsatellite*, 10 Human Molecular Genetics 1785 (2001) 20

Birney, Ewan, *ENCODE: My Own Thoughts*, Ewan's Blog; Bioinformatician at Large, Sept. 5, 2012, http://genomeinformatician.blogspot.com/2012/09/encode-my-own-thoughts.html (last visited Dec. 16, 2012).....32

Brown, David & Hristio Boytchev, *"Junk DNA" Concept Debunked by New Analysis of Human Genome*, Wash. Post, Sept. 5, 2012 31

Butler, John M., *Advanced Topics in Forensic DNA Typing: Methodology* (2012).....24

TABLE OF AUTHORITIES – Continued

Page

Butler, John M., et al., *Allele Frequencies for 15 Autosomal STR Loci on U.S. Caucasian, African American, and Hispanic Populations*, 48 J. Forensic Sci. 908 (2003) 16, 35

Comings, David E., *The Structure and Function of Chromatin*, *in* 3 Advances in Human Genetics 237 (H. Harris & K. Hirschhorn eds. 1972) 27, 28, 29

Cooper, Richard S., et al., *Race and Genomics*, 348 New Engl. J. Med. 1166 (2003) 35

Doolittle, W.F. & C. Sapienza, *Selfish Genes, the Phenotype Paradigm and Genome Evolution*, 284 Nature 601 (1980) 28

Dunham, Ian, et al., *An Integrated Encyclopedia of DNA Elements in the Human Genome*, 489 Nature 57 (2012) 31, 32

Eddy, Sean R., *The C-value Paradox, Junk DNA and ENCODE*, 22 Current Biology R898 (2012) 27

Electronic Frontier Foundation, Letter, *Haskell v. Harris*, No. 10-15152 (9th Cir. Sept. 11, 2012) (en banc) 30

Electronic Frontier Foundation, New Research on "Junk" DNA Raises Questions on Eve of Crucial Court Hearing, Sept. 11, 2012, https://www.eff.org/deeplinks/2012/09/new-research-on-junk-dna-raises-questions (last visited Dec. 16, 2012) 24, 31

TABLE OF AUTHORITIES – Continued

Page

Greely, Henry T., et al., *Family Ties: The Use of DNA Offender Databases to Catch Offenders' Kin*, 34 J.L. Med. & Ethics 248 (2006) 34

Hares, Douglas R., *Addendum to Expanding the CODIS Core Loci in the United States*, 6 Forensic Sci. Int'l: Genetics e135 (2012) 14

House Committee on the Judiciary, *Report on the DNA Analysis Backlog Elimination Act of 2000*, 106th Cong., 2d Sess., H.R. Rep. No. 106-900(1) 29

Jonnsson, Eric G., et al., *Failure to Replicate an Association Between a Rare Allele of a Tyrosine Hydroxylase Gene Microsatellite and Schizophrenia*, 248 Eur. Arch. Psychiatry & Clinical Neuroscience 61 (1998) 20

Katsanis, Sara H. & Jennifer K. Wagner, *Characterization of the Standard and Recommended CODIS Markers*, 41 J. Forensic Sci. (forthcoming 2013) (published online Aug. 24, 2012, doi:10.1111/j.1556-4029.2012.02253.x).....25

Kaye, David H., *The Genealogy Detectives: A Constitutional Analysis of "Familial Searching"*, 51 Am. Crim. L. Rev. No. 1 (forthcoming 2013) (prepublication version available at http://ssrn.com/abstract=2043091).....35

Kaye, David H., *The Double Helix and the Law of Evidence* (2010) 5

TABLE OF AUTHORITIES – Continued

Page

Kaye, David H., *Please, Let's Bury the Junk: The CODIS Loci and the Revelation of Private Information*, 102 Nw. U. L. Rev. Colloquy 70 (2007) 15, 22

Kaye, David H., *Behavioral Genetics Research and Criminal DNA Databanks*, 69 Law & Contemp. Probs. 259 (2006) 23

Kaye, David H. & George Sensabaugh, *Reference Guide on DNA Evidence*, *in* Reference Manual on Scientific Evidence 129 (Federal Judicial Center, 3d ed. 2011) 5

Kazazian, Haig H., *Mobile DNA: Finding Treasure in Junk* (2011) 26

Klintschar, Michael, et al., *Physical Location and Linked Genes of Common Forensic STR Markers*, 128 Int'l Congress Series 801 (2006) 15

Lohmueller, Kirk E., *Graydon, et al. Provide No New Evidence that Forensic STR Loci Are Functional*, 4 Forensic Sci. Int'l: Genetics 273 (2010) 35

Mercer, Stephen B. & William G. McLain, *Maryland's DNA Databank*, Md. Bar J., Nov.-Dec. 2004, at 17 29

National Human Genome Research Institute, The ENCODE Project: ENCyclopedia Of DNA Elements, Sept. 27, 2012, http://www.genome.gov/10005107 (last visited Dec. 16, 2012) 30

TABLE OF AUTHORITIES – Continued

Page

Ohno, Susumu, *So Much "Junk" DNA in Our Genome*, 23 Brookhaven Symposia in Biology 366 (1972) 27, 29

Orgel, Leslie E. & Francis H.C. Crick, *Selfish DNA: The Ultimate Parasite*, 284 Nature 604 (1980) 28

Ranum, Laura P.W. & Thomas A. Cooper, *RNA-Mediated Neuromuscular Disorders*, 29 Ann. Rev. Neuroscience 259 (2006) 19

Reed, Terry, et al., *High Heritability of Fingertip Arch Patterns in Twin-pairs*, 140A Am. J. Med. Genetics 263 (2006) 4

Timmer, John, *Most of What You Read Was Wrong: How Press Releases Rewrote Scientific History*, Ars Technica, Sept. 10, 2012, http://arstechnica.com/staff/2012/09/most-of-what-you-read-was-wrong-how-press-releases-rewrote-scientific-history/ (last visited Dec. 16, 2012) 25

U.S. Congress Office of Technology Assessment, *Genetic Witness: Forensic Uses of DNA Tests* 132 (1990) 20

Watson, James, et al., *Molecular Biology of the Gene* 142 (6th ed. 2008) 12, 14

INTEREST OF *AMICI CURIAE*

Amici curiae are ten physicians, human geneticists, statistical geneticists, molecular biologists, or other researchers in human genetics or forensic science.[1] They have conducted research at some of the world's leading medical schools, universities, and government laboratories. They include members of the Institute of Medicine, of committees of the National Academy of Sciences and the National Institutes of Health, and the editorial boards of numerous genetics journals. *See* Appendix A.

Amici study the nature and transmission of genetic information. The issue before this Court involves a special kind of genetic information that has proven to be of great value in criminal justice. *Amici* submit this brief, on behalf of neither party, to inform the Court of the possible medical and social significance of the DNA data stored in law enforcement databases.

---

[1] Letters consenting to the filing of this brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than *amici* or their counsel, made any monetary contribution to its preparation or submission. No *amicus* is employed by any law enforcement agency or any company that has any commercial interest in law enforcement databases. One *amicus* served as a senior scientist for the FBI and was instrumental in the creation of the CODIS database system. Every *amicus* participated in preparing this brief.

SUMMARY OF ARGUMENT

This case concerns "genetic information" – information passed from parent to child according to the laws of genetics. But not all genetic information is equally important – biologically, medically, or socially. Unlike medical genetic tests, law enforcement identification profiles have no known value for medical diagnosis or prediction of future health.

The genetic information stored in U.S. databases is derived from what are called the "CODIS loci." Despite rapidly growing knowledge of the genome, no CODIS locus has been found to cause any genetic disease or trait. Furthermore, the scientific literature does not show that the loci are even moderately correlated with disease status, physical traits, or behavioral predispositions. Although no one can say with certainty what the future will bring and it is possible that specific loci will be found to affect the operation of certain genes or to display correlations to disease states, it is unlikely that the identification profiles will turn into powerful medical diagnostic or predictive tools that can be used to infer disease states or predispositions by examining forensic database records.

That said, the records have other actual or possible uses beyond individual identification. They can be used to establish genetic family relationships (parent-child, sibling, etc.). In addition, they could be used to make rough inferences about geographic or ethnic

origins, although there are far more accurate genetic indicators of this kind of ancestry.

Recent research, notably the ENCODE project, has given rise to speculation in the press that all DNA sequences affect development and health. This is not true. Although the research lowers the percentage of the genome that might colloquially be called "junk," it does not support any use of the CODIS markers to predict genetic diseases or traits. Estimates of the proportion of the genome that is "junk" are only vaguely related to the medical and social relevance of the CODIS markers. Published studies do not establish that the database records are likely to become valuable for medical diagnosis or prediction. The ENCODE data should enhance knowledge of molecular mechanisms and promote more refined definitions of genetic diseases, but this knowledge will not transform those forensic loci that continue to have weak, inconsistent, or undetected disease associations into ones with substantial predictive power.

ARGUMENT

All humans inherit their DNA from their parents. This DNA contains information that can lead to significant predictions about a person's current or future diseases and various traits. Governments have enacted protections against genetic testing because of concerns about discriminatory uses of this kind of

information. *E.g.*, Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff. But not all DNA carries such information.[2] The DNA variations used for criminal identification represent common, normal human variation and have, at most, only weak associations with any diseases or physical or behavioral traits. However, they may provide powerful information about the presence (or absence) of genetic relationships of family members, as well as very weak information about geographic or ethnic categories.

These conclusions come from an analysis of the structure and sequence of DNA in the genome, the mechanisms by which cells use genetic information, and the statistical properties of genetic tests and inheritance.

---

[2] Many things can be considered as providing "genetic information," such as family medical history or even someone's sex. Indeed, parts of fingerprints are inherited. *E.g.*, Terry Reed, et al., *High Heritability of Fingertip Arch Patterns in Twin-pairs*, 140A Am. J. Med. Genetics 263 (2006). Certain fingerprint features have even been associated with diseases. *See* Appendix B.

I. DNA consists of coding and noncoding sequences.

A. The human genome consists of over three billion base pairs.

Science is unraveling the molecular mechanisms of inheritance.[3] Central to the process are interactions among deoxyribonucleic acid (DNA), ribonucleic acid (RNA), and proteins. These molecules are polymers – chains of smaller units linked to one another. The building blocks of DNA and RNA are "nucleotide bases." DNA contains four distinct nucleotides (abbreviated A, T, C, and G) arrayed inside the famous double helix. An A on one strand binds to a T on the other, and a C pairs with a G. The genetic "sequence" is the order of these nucleotides. Because of the pairing rule, a single letter can denote a pair of bases – an A can be written for A:T, for example.

The vast bulk of the DNA in a human cell is crammed into the cell nucleus, coiled around proteins in structures called chromosomes. Humans normally have 46 chromosomes. Forty-four come in pairs, with one member inherited from the father and one from the mother. These 44 paired chromosomes are called "autosomes," and the pairs are numbered 1 through

---

[3] The exposition here presents material found in many textbooks. For nontechnical presentations tailored to forensic genetics, see David H. Kaye, *The Double Helix and the Law of Evidence* (2010); David H. Kaye & George Sensabaugh, *Reference Guide on DNA Evidence*, *in* Reference Manual on Scientific Evidence 129 (Federal Judicial Center, 3d ed. 2011).

22. The other two chromosomes are the sex chromosomes. Women have two copies of the X chromosome; men have one X (inherited from their mothers) and one Y (inherited from their fathers).[4]

The complete list of all of the bases on all 46 chromosomes is that person's entire genome sequence. In a sense, each person has two genomes, one from the father and one from the mother. Each "haploid" genome (the autosomes plus the sex chromosome from one parent) is about 3.2 billion base pairs long. If all these A's, C's, G's, and T's were written in book form, they would be as long as several copies of the U.S. Reports – not one volume, but the entire 552 volumes.

The two haploid genome sequences a person inherits are very similar to each other and, indeed, to those of every other human. On average, any two genomes differ in only about one base pair in one thousand. The variations are responsible for the genetic differences between people – different blood types, skin colors, disease susceptibilities, and all other genetic traits.

---

[4] The inherited chromosomes are usually not identical to those of each parent. In the process of making sperm and eggs, the parent's two copies of every autosomal chromosome swap some DNA so that each chromosome that gets passed on is a combination of the two copies of the chromosome the parent inherited.

In the early 2000s, the multinational Human Genome Project sequenced most of the 3.2 billion base pairs in the haploid genome from several anonymous individuals. Only a small percentage of those base pairs are involved in what has been understood as the primary function of DNA – "coding" the chemical structure of the proteins and RNAs in the human body. A larger, but still unknown percentage regulates the production of protein and RNA from the coding DNA. Most of the sequence, however, seems to provide no meaningful information. Part B describes the process of "gene expression" by which the body uses coding DNA sequences to produce proteins and RNAs.

B. The exons of genes code for proteins and RNAs.

A gene is not an arbitrary sequence of base pairs. Parts of the sequence specify which chemical units fit together to form a particular protein (or RNA, if that is the product encoded in the gene) and the order in which these units will be arranged.

1. Active protein-coding genes are transcribed into precursor messenger RNA (pre-mRNA).

Protein-coding genes express their sequence-specific information through three major steps: (1) transcription; (2) post-transcriptional modification and transportation; and (3) translation and post-translational processing. In the first step, the base

pairs of the gene are transcribed jot-for-jot into an RNA molecule. This transcript is known as precursor messenger RNA (pre-mRNA). The DNA in the chromosomes must open up for transcription to occur. Transcription factors (specialized proteins) bind to the chromosomal DNA. The bound transcription factors then recruit an enzyme (RNA polymerase) that produces the RNA polymer by "reading" and copying the DNA sequence into this new chemical form. Unlike duplex DNA, RNA is a single helical strand, and a different nucleotide (abbreviated U) is used instead of T.

The small region of the gene to which the RNA polymerase binds is called a promoter. The level of transcription is influenced by activator or repressor proteins that bind to still other small regulatory regions (enhancers and silencers) that also lie outside the part of the gene that specifies how to assemble the protein's building blocks. After emerging from the bound RNA polymerase, the pre-mRNA transcripts must be chemically modified for protein synthesis to progress.

2. Pre-mRNA is processed into messenger RNA.

In the second step, the pre-mRNA transcripts are modified at their ends to protect them from being degraded, and special RNA-protein complexes known as spliceosomes cut away the noncoding parts, generating mature mRNA. The discarded parts correspond

to long stretches of DNA, known as introns. Introns interrupt the much smaller coding parts – the exons – as shown *infra* Figure 1 (not to scale).[5] The RNA transcribed from the exons becomes the mRNA that will be translated into proteins.[6]

3. Messenger RNA is translated into proteins.

In the third phase, the mature mRNA makes its way to ribosomes, microscopic workbenches made of proteins and another RNA (ribosomal RNA). Yet another RNA (transfer RNA) brings the building blocks of proteins (amino acids) to the workbenches. There, they are joined in the order dictated by the mRNA transcript. By combining the amino acids in different orders, a virtually unlimited variety of proteins can be constructed.

The translation of mRNA into amino-acid sequences follows a strict genetic code. Sequences of three mRNA nucleotides code for the 20 amino acids. For example, the mRNA sequence GAA translates into a glutamic acid unit in a protein. Thus, the mRNA is "translated" into proteins according to

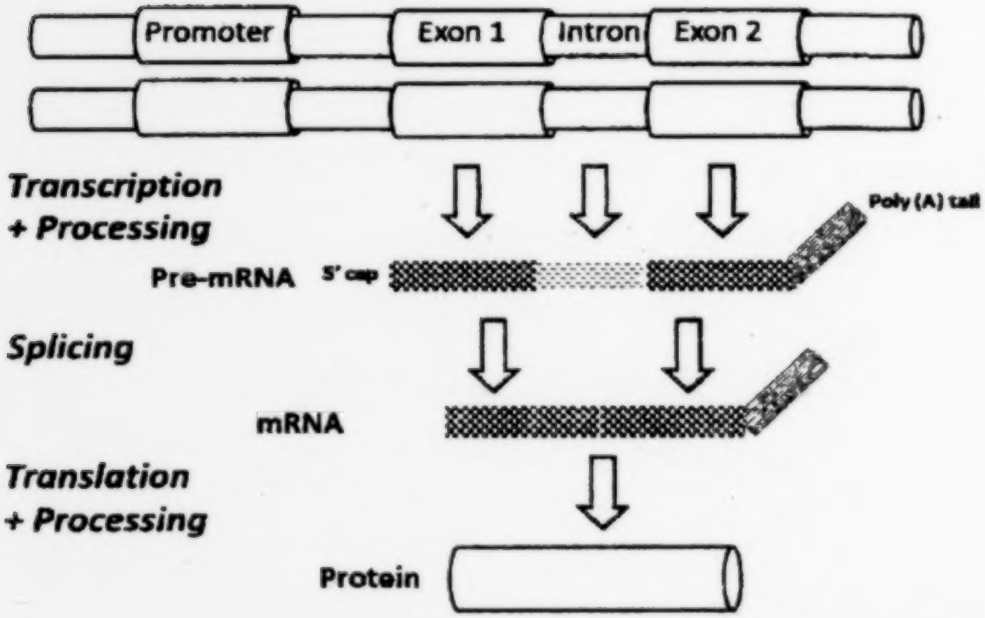
---

[5] The average number of introns in human genes is eight. The size of introns varies much more than that of exons, suggesting that introns are under less pressure from natural selection because they are less important in gene expression.

[6] In some instances, intronic sequences remain in mature mRNA.

"words" such as GAA. Given that the mRNA is a faithful transcription of the sequence of base pairs in the exons, the amino-acid sequence reflects the original sequence of A's, T's, C's, and G's in the exons. Via these three-letter "words," the gene is "expressed" as a protein. Figure 1 provides a schematic representation.

Figure 1. From Gene to Protein.
Transcription, post-transcriptional processing, translation, and post-translational processing.



4. Some genes are only transcribed into RNAs.

Many DNA sequences are not transcribed into messenger RNA. Consequently, they are not expressed as proteins. Some of these sequences are important, however, because they are transcribed into functional RNAs. These DNA sequences are still

considered genes, but their final products are non-protein-coding RNAs (ncRNAs). These ncRNAs include the ribosomal and transfer RNAs that do the work of translation as well as other ncRNAs involved in regulating expression of dozens and even hundreds of protein-coding genes. Furthermore, much shorter RNAs regulate transcription and translation. Thus, it is widely recognized that the genome is abuzz with transcription-to-RNA activity and other events that interact in the expression of the protein-coding DNA.

The discoveries of these processes have generated speculation in the press and some judicial opinions that *all* DNA sequence variations significantly affect development and health. *See infra* Part V. This is not true – even for sequences that are transcribed. Not every biochemical event along the DNA has an impact on health. First, some short ncRNA transcripts are just "noise." They are degraded quickly. Second, intronic parts of the pre-mRNA transcripts normally are removed. Third, even if one transcript could regulate expression, other transcripts may do the same job. Fourth, even if the stable transcript does affect some trait, the effect may be so minor in the context of other genetic and environmental influences as to be of no meaningful predictive or diagnostic value. Finally, even if a stable transcript has a dramatic effect on a trait, that trait may be unrelated to disease status. Consequently, regarding every bit of the genome as if it were a medical record is unwarranted.

C. There are many types of noncoding DNA.

Functional genes have a promoter sequence, exons and introns separated by splicing junctions, and untranslated regions (UTRs) at the start of the first exon and the end of the last one. The protein-coding parts of such genes (the exons) represent only a few percent of the genome. The introns boost the size of human genes by a factor of nearly 20. But genes and gene-related sequences add up to less than 40% of the genome.

The remaining 60+% lies between genes. About 25% of intergenic DNA consists of sequences that occur only once. Some of this 25% consists of apparently nonfunctional relics of evolution such as no-longer-working mutated genes, gene fragments, and other evolutionary relics known as pseudogenes.[7] Other intergenic parts are enhancers and silencers as well as sequences that code for so-called micro-RNAs that alter the stability of the mRNA or its ability to be translated.[8]

The remaining 75% of intergenic DNA – almost half the total human genome – is composed of DNA

---

[7] For further explanation, see James Watson, et al., *Molecular Biology of the Gene* 142 (6th ed. 2008).

[8] The definition of a gene is subject to vigorous debate, and the percentages given here are not exact. Many authorities classify enhancers and silencers as part of the gene-related DNA mentioned in the previous paragraph.

sequences repeated many times in the genome. This DNA mostly falls into two classes. First, microsatellite DNA – also called simple sequence repeats (SSRs) or short tandem repeats (STRs) – represents nearly 3% of the genome. It contains tandemly repeated short sequences. The most common STRs are made of only two nucleotides (e.g., ACACACACACACACAC). For many STR loci, different individuals have a different number of repeats. These length variations result from difficulties that sometimes arise when all the DNA is replicated prior to cell division: imperfectly copied versions of STRs arise with, say, 7 or 9 copies of AC rather than 8.

Second, "genome-wide repeats" have repeat units 10 or 100 times as large as those in STRs. There are numerous classes of genome-wide repeats, but all are forms of transposable elements – sequences that can move from one place in the genome to another, usually leaving the original copy behind. The transposons have been so successful at duplicating themselves over evolutionary time that they constitute about 45% of the human genome.[9]

Figure 2 summarizes the organization and content of the human genome. (Early DNA databases employed the type of genome-wide repeats known as minisatellite DNA, or VNTRs, but these were

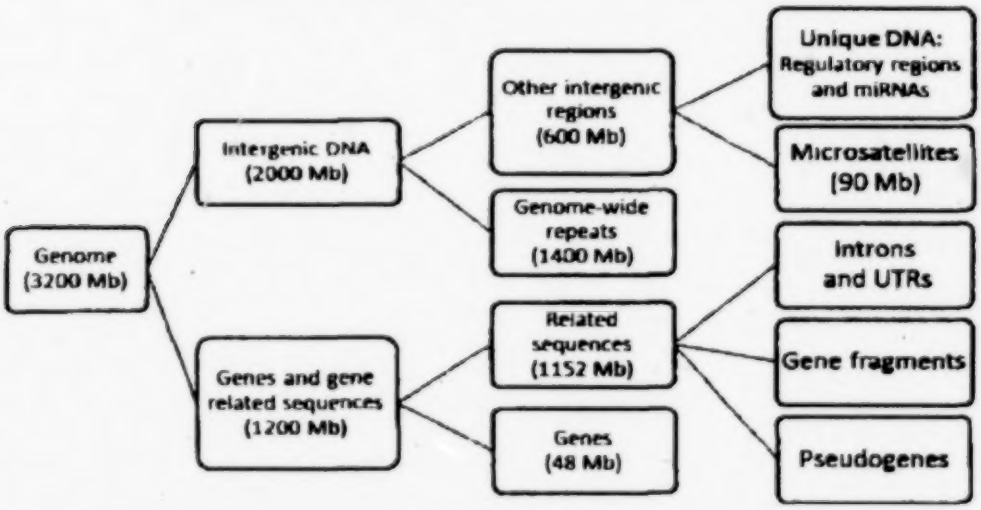
---

[9] It omits about 3-4% of the genome associated with structural elements of chromosomes – centromeres and telomeres.

supplanted in the mid-1990s by the STRs described in the next section.)

Figure 2. Organization and Content of the Human Genome

Adapted from James D. Watson et al., *Molecular Biology of the Gene* 143 (6th ed. 2008). "Mb" stands for a million base pairs. CODIS profiles come from selected microsatellites that compose ~0.004 Mb of intergenic and intronic DNA.



II. CODIS loci are one type of repetitive DNA useful for human identification.

In 1990, the FBI introduced software, known as CODIS (Combined DNA Index System), for sharing VNTR and other information among state and local databases. In 1997, the FBI chose 13 STRs for the CODIS database system. There are thousands of STRs, but the 13 were among the most well-defined at the time, and they had no disease associations with predictive power. Currently, the FBI is considering adding more intergenic STRs. Douglas R. Hares, *Addendum to Expanding the CODIS Core Loci in the United States*, 6 Forensic Sci. Int'l: Genetics e135 (2012).

In each of the 13 "CODIS core loci," a short DNA sequence (a "tetranucleotide" of four base pairs) is repeated a variable number of times. All these loci are on autosomes. Because everyone normally has two copies of each autosome,[10] a person should have two copies of each CODIS STR, one from each parent. Five of the loci are in the introns of genes; the other eight are found outside of genes.[11] The 13 STRs combined make up about 4,000 base pairs in the average person, only a little more than one-millionth of the 3.2 billion base pairs in a haploid genome.

Spread over 12 different chromosomes, the CODIS loci have names such as TPOX[12] and D5S818.[13] The CODIS STRs were chosen in part because they are commonly found in a variety of lengths in every major U.S. population group. Each different number of repeats – reflecting a variation in the sequence of bases in that location – is called an

---

[10] A few people are born with extra chromosomes. The limited privacy implications of CODIS profiles for revealing chromosomal abnormalities are noted in David H. Kaye, *Please, Let's Bury the Junk: The CODIS Loci and the Revelation of Private Information*, 102 Nw. U. L. Rev. Colloquy 70 (2007).

[11] *But see* Michael Klintschar, et al., *Physical Location and Linked Genes of Common Forensic STR Markers*, 128 Int'l Congress Series 801 (2006) (suggesting that the D3S1358, D7S820 and D18S51 STRs should be considered intronic).

[12] This STR is found in an intron of the thyroid peroxidase gene.

[13] Names of the eight markers not found in genes are in the form D#S###. The first number indicates the chromosome; the second, a location on the chromosome.

"allele." For each locus, at least six alleles are fairly common in humans. Thus, D5S818 is a place on chromosome 5 where people have a series of repeated AGAT bases. The most common numbers of AGAT repeats are 11, 12, and 13, which make up over 85% of the alleles found in samples of Americans.[14] If a person has a rarer, 7-repeat allele, the sequence will read (AGAT)(AGAT)(AGAT)(AGAT)(AGAT)(AGAT)(AGAT).[15] Each of us will normally have two copies of the sequence. For example, if a boy inherited a 7-repeat STR on his father's chromosome 5 and a 12-repeat one on his mother's, his type for that locus would be 7, 12.

An individual's overall CODIS profile is 13 such pairs of numbers. To produce the profile, the laboratory measures the lengths of the 13 pairs of alleles. It does not examine the other 99.9999% of the genome.

---

[14] Nine- and 10- repeat alleles make up another 10%, with 7-, 8-, 14-, and 15-repeat alleles accounting for another few percent. John M. Butler, et al., *Allele Frequencies for 15 Autosomal STR Loci on U.S. Caucasian, African American, and Hispanic Populations*, 48 J. Forensic Sci. 908 (2003).

[15] Some CODIS loci have compound repeat units (such as TCTA/TCTG in the vWA intron), and some loci have occasional repeat units that are less than the full four base pairs long. These complications do not detract from the forensic value of the loci.

III. Variations in CODIS loci are not known to be causally related to physical or behavioral traits.

Variations in the length of the forensically relevant STRs do not appear to cause any differences in any genetic traits. Indeed, their value in human identification relates to this feature. Regions of DNA with particular functions – whether they encode proteins or RNAs, or are regulatory – usually do not vary much among people (although variations that have minor phenotypical effects, such as hair color, are present within and across populations). Most new variations in functional DNA tend to be harmful because they would result in the production of a functionally different protein or ncRNA or would change the quantity of those products. Individuals with deleterious DNA sequences will usually not have as many children as individuals with functionally normal sequences. Natural selection thus tends to conserve functional sequences from one generation to the next. Conversely, nonfunctional regions usually will be free of this selective pressure. Over time, mutations there can spread more readily through the population.

Most STRs are not under detectable selective pressure. Therefore they can easily vary widely among individuals with little consequence to any individual. The large number of variants of the forensic STRs found in all major population groups makes them particularly valuable for identity testing. At the same time, the lack of evidence of constraints

on these STRs means that most are unlikely to have any function related to genetic traits such as disease susceptibility.

A. CODIS loci are not known to be translated into proteins.

There is no evidence that CODIS loci are translated into amino acids of a protein. All proteins are based on the translation of mRNA, and no one has ever pointed to any mRNA that includes any of the CODIS alleles. The absence of any direct evidence is not conclusive, but it is substantial evidence. After all, these loci have been used as signposts in disease-association studies for some 20 years with no published reports establishing that they have predictive value in any major population group.

The addition or subtraction of a single tetranucleotide repeat unit in an exon could have a dramatic, adverse effect on the protein product.[16] Thus, STR variations in coding DNA are unusual, but they do occur, and a number are known to cause neuromuscular diseases. However, these are almost always triplet repeats – a type not used for forensic loci – with many more expansions than the

---

[16] The DNA "words" that spell out an amino acid have three base pairs each. Adding or subtracting one set of four letters changes the way all the downstream DNA is read. That some repeat numbers have no adverse effects while others do cause disease by changing protein structure therefore seems unlikely.

tetranucleotide CODIS STRs exhibit. The CODIS loci were chosen because, unlike the disease-producing triplet repeats, they are *not* part of exons.

B. CODIS loci are not known to be transcribed into regulatory ncRNA, but one intronic CODIS locus has been shown to have some regulatory effect.

Within the past decade, much has been learned about the mechanisms by which some fraction of the ncRNA plays a role in regulation – turning genes on and off and modulating the quantity of proteins produced. Scientists know much less about these ncRNAs than they do about mRNA. A CODIS locus might encode some as yet unrecognized ncRNA, but, again, DNA that performs important functions, such as encoding functional ncRNA, usually would be highly conserved, as natural selection tends to weed out damaging variations.

A number of STRs within introns have been shown to regulate splicing and hence to alter mRNA transcripts. In one case, the STR is a tetranucleotide repeat (but in a larger size range and different part of the genome than any of the CODIS tetranuceotide repeats). Laura P.W. Ranum & Thomas A. Cooper, *RNA-Mediated Neuromuscular Disorders*, 29 Ann. Rev. Neuroscience 259 (2006).

One intronic CODIS locus (TH01) has been reported to alter levels of expression of the gene in

which it is located. Véronique Albanèse, et al., *Quantitative Effects on Gene Silencing by Allelic Variation at a Tetranucleotide Microsatellite*, 10 Human Molecular Genetics 1785 (2001). Thus, it is possible that at least one current CODIS locus participates in a regulatory system that at some point might be shown to affect individual health. However, elucidating a mechanism by which a CODIS STR could have a disease-related effect would not automatically make the locus any more predictive than it is now, and the TH01 locus has not been shown to be useful for diagnosis or prediction. *E.g.*, Eric G. Jonnsson, et al., *Failure to Replicate an Association Between a Rare Allele of a Tyrosine Hydroxylase Gene Microsatellite and Schizophrenia*, 248 Eur. Arch. Psychiatry & Clinical Neuroscience 61 (1998).

IV. Variations in CODIS loci could be correlated with physical or behavioral traits, but no substantial correlations have been observed in forensically relevant populations, and database administrators, employers, or health insurers are not likely to find correlations useful for disease diagnosis or prediction.

Since the earliest years of forensic DNA testing, it was understood that noncoding sequences could display "some association" with disease-causing mutations. U.S. Congress Office of Technology Assessment, *Genetic Witness: Forensic Uses of DNA Tests* 132 (1990). Most research trying to find such

mutations relied on these associations, and much of it still does. In fact, the CODIS STRs are a subset of the many STRs used to locate and then develop tests for causal mutations. To see how this gene hunting works, suppose that a man is born with a disease-causing variant in one copy of a gene and that this variant is very close to an STR locus. Assume the disease-causing variant is on a chromosome that the man inherited from his father and that the STR on that chromosome has 10 repeats. The man's maternal chromosome does not have the disease-causing variation, and its nearby STR has, say, 12 repeats. Assume the man has two children and that one inherited from him a copy of the chromosome with the disease-causing variation and the other did not. The child with the disease-causing variation also inherited the 10-repeat allele of the nearby STR; the other child inherited the 12-repeat copy. Observing such co-inheritance of a marker and a genetic disease tells researchers that a gene mutation causing the disease lies near the STR marker. But the STR marker in no way "causes" the disease; it is simply a tool for locating the causal mutation.[17] A genetic test for that

---

[17] The man's children will not always inherit the disease-causing variation along with the same allele of the nearby STR. As the man's body makes sperm, his two copies of chromosome 4 will exchange some genetic material. *See supra* note 4. The closer the disease-causing variation and the STR are to each other, the more likely they are to be inherited together; the farther apart, the less likely. This frequency of co-inheritance was used to create the first genetic maps nearly a century ago, long before DNA was known to be the carrier of inheritance.

mutation then can be developed. This genetic test may be generalizable to other families even though the STR marker is not.

This association between the 10-repeat STR allele and the disease-causing variation can be used for risk prediction within a family, but as the population grows larger and more diverse, as in the United States, the marker loses its value. Most people with the disease-causing variation will not have a 10-repeat allele in the nearby STR. That was the repeat length in this particular family, but affected individuals in other families, with other genetic histories, are likely to have repeat numbers that span the entire range of alleles. Similarly, most people with the 10-repeat allele will not carry the disease-causing variation. Crude calculations suggest that a positive result on the 10-repeat "test" for the disease-causing mutation in a national database might be correct in less than one case in a thousand.[18]

This problem of low predictive value is particularly acute with a rare disease or trait. Any imperfect marker of a trait becomes less useful when the trait is rare. Take a test for a disease that has a very low "false positive" rate – for example, out of 100 tests, only one is a false positive. Nevertheless, if the condition is only found in one person in a thousand, applied to 1000 people, the test will show about 10 false positives for the one true positive. The positive

---

[18] *See* Kaye, *Bury the Junk*, at n.26.

predictive value – the percentage of people with a positive test who actually have the condition – will be quite low. As most genetic diseases or genetic variations strongly linked to diseases are uncommon, typically occurring at well under a one percent rate, even an unrealistically strong association between an STR repeat length and a disease typically would not be a good disease predictor.

One might think that there could be greater predictive value if an STR locus is physically linked to a gene involved in a common disease such as diabetes. But common diseases and health problems are affected by multiple genes and strongly influenced by environmental factors. The same is true of behavioral traits that, some have speculated, might become the target of a screening test on identification profiles in a database. David H. Kaye, *Behavioral Genetics Research and Criminal DNA Databanks*, 69 Law & Contemp. Probs. 259 (2006). Even if a particular CODIS STR coincidentally turned out to be strongly associated with one gene in such a system, the correlation with the disease will be greatly diluted.

These are good reasons to believe that any associations between CODIS alleles and genetic traits are likely too small to be useful. In fact, no useful associations have been proven.[18] Some writers claim that

---

[18] A Vermont trial court found "genetic information [in five CODIS loci] "associated with at [least] eight different medical conditions [and] genetic functions or physical traits associated

(Continued on following page)

studies have identified repeat numbers for the CODIS loci that are powerfully predictive or diagnostic of important diseases in the U.S. population.[20] These claims almost never come from scientists and are not substantiated by scientific studies. *See* John M. Butler, *Advanced Topics in Forensic DNA Typing: Methodology* 228 (2012) (noting the misinterpretation of the literature in a law review exchange said by the Maryland Court of Appeals in this case to demonstrate "considerable current debate," *King v. State*, 42 A.3d 549, 560 n.17 (Md. 2012), *cert. granted sub nom. Maryland v. King*, No. 12-207 (U.S. Nov. 9, 2012)).

At present, there are no published, replicated studies that permit the database records of variations in CODIS STR lengths to be the basis for valid

---

with one or more of the CODIS loci." *State v. Abernathy*, No. 3599-9-11, at 11 (Super. Ct. June 1, 2012), *app. pending*, Vt. No. 2012-102. Neither the opinion nor the testimony presented to the court adequately addressed the predictive value of the putative associations. In addition, the studies listed in the opinion have not been replicated and shown to apply to the U.S. population. Some are merely family studies, which are not expected to provide useful predictive disease markers outside of the families studied. Finally, it is instructive to compare the small number of reports of disease associations to CODIS STRs with the much larger number for fingerprint features. *See* Appendix B.

[20] *E.g.*, Electronic Frontier Foundation, New Research on "Junk" DNA Raises Questions on Eve of Crucial Court Hearing, Sept. 11, 2012, https://www.eff.org/deeplinks/2012/09/new-research-on-junk-dna-raises-questions ("DNA . . . in the form of . . . an extracted profile . . . can reveal . . . medical history, predisposition for disease, and possibly even behavioral tendencies and sexual orientation.").

predictions or diagnoses. To the contrary, the most recent published review concludes that

> The . . . standard and recommended CODIS panels of STR loci . . . continue to be of limited significance for assessing phenotypes. . . . Several . . . overlay predicted sites for genomic regulation, but there is no evidence that any particular repeat [is] indicative of phenotype. The utility of the CODIS profile itself, even in light of the significance of various epigenetic effects and roles of noncoding RNAs, is limited to identification purposes at this time.

Sara H. Katsanis & Jennifer K. Wagner, *Characterization of the Standard and Recommended CODIS Markers*, 41 J. Forensic Sci. (forthcoming 2013).

V. Estimates of the proportion of the genome that is "junk" are largely irrelevant to the privacy interests implicated by CODIS loci.

The term "junk DNA" has both a colloquial and a scientific meaning. Eliding one with the other is dangerous.[21] Only a subset of noncoding DNA is "junk" as the term is used (often with misgivings) in genetics. For the term to apply, the DNA not only must lie outside of genes, but variations in its

---

[21] *See* John Timmer, *Most of What You Read Was Wrong: How Press Releases Rewrote Scientific History*, Ars Technica, Sept. 10, 2012, http://arstechnica.com/staff/2012/09/most-of-what-you-read-was-wrong-how-press-releases-rewrote-scientific-history/.

base-pairs must have no detectable effect on the fitness of the organism.[22] If substituting a randomly generated sequence would not noticeably influence reproductive success, then the original sequence is, in a sense, "junk." But geneticists always have maintained that such DNA is not necessarily useless or inactive. Sometimes we can salvage parts of our junk for new uses. Thus, even when "junk" sequences of base-pairs do not affect how an individual functions, they can be a kind of evolutionary "treasure." *See* Haig H. Kazazian, *Mobile DNA: Finding Treasure in Junk* (2011).

In this Part, *amici* do not seek to settle the debate over the fraction of the genome that is, in an evolutionary sense, "junk." Rather, we explain why the question is orthogonal to the matter before the Court. The salient issue in this case is whether length variations in the STRs have a direct impact on, or a strong enough correlation with, significant non-observable traits to constitute private information. *Amici*'s position is that differing estimates of the percentage of the genome that is "junk" have no real bearing on this privacy issue. On the one hand, being "junk" is not the same as being uninformative. Therefore, even if the CODIS STRs should be called "junk,"

---

[22] "Fitness" is the average contribution to the gene pool of the next generation that is made by an average individual of the specified genotype. If differences between alleles affect fitness, then alleles with higher fitness will tend to become more common.

they could (in theory) still pose a privacy problem. On the other hand, even if only a tiny fraction of the genome sequence were uninformative, if the CODIS loci reside in that fraction, they would not pose a privacy problem.

A. In genetics, "junk DNA" denotes sequences that lie outside of genes and that are not under detectable selective pressure: that such DNA exists is not in doubt.

In 1972, biologists introduced the term "junk" to refer to "untranscribable and/or untranslatable DNA," Susumu Ohno, *So Much "Junk" DNA in Our Genome*, 23 Brookhaven Symposia in Biology 366, 367 (1972), that does not function as genes and whose specific sequence is "relatively useless." David E. Comings, *The Structure and Function of Chromatin*, *in* 3 Advances in Human Genetics 237, 313 (H. Harris & K. Hirschhorn eds. 1972). Ample data had established that many organisms have "excess" DNA – in copious amounts.[23]

---

[23] For example, it is striking that total genome size does not always increase with the complexity of organisms: "the lowly liverwort has 18 times as much DNA as we, and the slimy, dull salamander known as *Amphiuma* has 26 times our complement of DNA." Comings, *supra*, at 313. Even very similar species have wildly disparate genome sizes. *E.g.*, Sean R. Eddy, *The C-value Paradox, Junk DNA and ENCODE*, 22 Current Biology R898 (2012).

To explain this phenomenon, several researchers proposed that a large fraction of DNA simply has little or no adaptive advantage for the organism. W.F. Doolittle & C. Sapienza, *Selfish Genes, the Phenotype Paradigm and Genome Evolution*, 284 Nature 601 (1980); Leslie E. Orgel & Francis H.C. Crick, *Selfish DNA: The Ultimate Parasite*, 284 Nature 604 (1980). They suggested that this fraction comes from "selfish DNA" that makes copies of itself at the (usually slight) expense of a host genome. *See supra* Part I.C (discussing transposons). Not being subject to natural selection, as untold generations go by, the copies can decay, through many small mutations, into "junk."

That not *all* the DNA sequences of complex organisms are involved in RNA and protein synthesis is indisputable. Conversely, since the early days of molecular biology, that *some* noncoding DNA regulates the operation of genes has been clear. The question that invites disagreement is "how much junk, how much func?"[24]

B. "Junk" DNA sequences could be biologically useful or interesting yet not be useful for disease diagnosis or prediction.

The originators of the "junk DNA" label recognized that some DNA elements containing arbitrary

---

[24] Early estimates of "mutational load" suggested "that maybe only 1-20% of the human genome could be genic, with the rest evolving neutrally or nearly so." Comings, *supra*, at 313.

DNA sequences could be biologically useful, if only as spacing material. *See* Comings, *supra*, at 316; Ohno, *supra*, at 367–68. However interesting or accurate these theories may be, they have no necessary connection to whether specific sequences are informative of individual traits.

On the one hand, we have seen that correlations could arise from the proximity of STRs to important genes. Therefore, it would be wrong to argue that just because "the genetic markers used for forensic DNA testing . . . show only the configuration of DNA at selected 'junk sites' which do not control or influence the expression of any trait," it clearly follows that they "do not reveal information relating to any medical condition or other trait." House Committee on the Judiciary, *Report on the DNA Analysis Backlog Elimination Act of 2000*, 106th Cong., 2d Sess., H.R. Rep. No. 106-900(1), at 27 (letter from Dep't of Justice to Chairman, House Comm. on the Judiciary, July 21, 2000).

But by the same token, it would be wrong to intimate that just because some noncoding DNA is useful as a "spacer" or actually is biologically active, the CODIS loci probably carry highly personal information. Moreover, even if some length differences of some of these STRs prevented or increased transcription of regulatory RNAs, it would not necessarily follow that they are "essential biological instructions for growth and survival of an organism," Stephen B. Mercer & William G. McLain, *Maryland's DNA Databank*, Md. Bar J., Nov.-Dec. 2004, at 17, 22, and

therefore "sensitive and private." Electronic Frontier Foundation, Letter, *Haskell v. Harris*, No. 10-15152 (9th Cir. Sept. 11, 2012) (en banc). They might have no effect at all because there are alternative paths to the same outcomes, or the affected traits might be no more significant than, say, the thickness of the eyebrows or the width of the nose. One must ask whether the length variations of the particular STRs actually convey meaningful information, and they seem to contain less trait-related information than a photograph of an arrestee.

C. ENCODE data do not reveal that anywhere near 80% of the genome contains medically relevant information.

Just as something can be inactive and functional, so too can something be active and nonfunctional. This fact prompts a few words about recent publicity surrounding the publication of data from the Encyclopedia of DNA Elements (ENCODE) Project. ENCODE is a federally funded public research consortium launched in September 2003, with the goal of identifying "all functional elements in the human genome sequence." National Human Genome Research Institute, The ENCODE Project: ENCyclopedia Of DNA Elements, Sept. 27, 2012, http://www.genome.gov/10005107. In September 2012, the project's leaders announced the release of many data sets on biochemical activity along the genomes of different types of human tissues. They stated that these data "enabled us to assign biochemical functions for 80% of

the genome." Ian Dunham, et al., *An Integrated Encyclopedia of DNA Elements in the Human Genome*, 489 Nature 57 (2012) (abstract).

The value of the data to future research cannot be gainsaid, but interpretations such as the following are unsupportable:

> This research has determined that more than 80% of DNA once thought to be no more than "junk" [controls] how our cells, tissue and organs behave. . . . Based on the research, it is highly likely the genetic markers contained in each Appellant's DNA profile reveal much more information than just his or her identity – information that is sensitive and private. . . .

Electronic Frontier Foundation, *supra* note 20.

The misperception that all noncoding DNA is involved in disease processes or bodily functioning is understandable in light of hyperbolic headlines such as David Brown & Hristio Boytchev, *"Junk DNA" Concept Debunked by New Analysis of Human Genome*, Wash. Post, Sept. 5, 2012. Nonetheless, the ENCODE publications do not state that 100% or even 80% of the genome makes organs function, stimulates tissue growth, turns normal cells into cancerous ones, makes us tall or short, fat or skinny, gay or straight. The main paper defines "a functional element" to include "a discrete genome segment that . . . displays a reproducible biochemical signature," and "functional" merely designates "something that changes a

biochemical property of the cell." Ian Dunham, et al., *supra*.[25]

This definition contrasts sharply with the notion of functional as affecting a nontrivial trait. The ENCODE papers show that 80% of the genome displays signs of certain types of biochemical activity – even though the activity may be insignificant, pointless, or unnecessary. This 80% includes all of the introns, for they are active in the production of pre-mRNA transcripts. But this activity hardly means that all introns are doing useful work as regulators or anything else.

In sum, a "functional element" in ENCODE has no clear or direct implications on how informative the forensic loci are. Even after this phase of ENCODE, there is still a huge number of base pairs that might or might not be regulatory or influence regulation and, hence, gene expression. The ENCODE papers appear to place the percentage of the genome that regulates the 2% or so that encodes proteins at less

---

[25] That the ENCODE researchers are using "functional" in a very technical sense is clear from their own writings. The project's leader explained that this definition of "functional" does not mean "something that changes a phenotypically observable trait as that affects the whole organism." Ewan Birney, ENCODE: My Own Thoughts, Ewan's Blog; Bioinformatician at Large, Sept. 5, 2012, http://genomeinformatician.blogspot.com/2012/09/encode-my-own-thoughts.html. Dr. Birney's personal estimate of the percentage of the genome that affects the organism beyond an inconsequential chemical reaction in a cell is only 20%. *Id.*

than 20%. The CODIS STRs might be (but, more likely, might not be) among this 20%. The ENCODE findings indicate that the system that regulates gene expression is exquisitely complex, but they do little to change the status of "junk DNA" in general, or – to focus on the only relevant point in this case – the CODIS loci in particular.

VI. The CODIS loci can provide information about specific family relationships as well as weak information about racial or ethnic background.

Because children inherit all their DNA from their biological parents, the CODIS loci can be powerful tools for determining whether two people could be genetically related as parent and child. Because a child receives one allele at every autosomal locus from the mother and one from the father, it is often simple to show that a pair of unrelated individuals cannot be parent and child. For instance, if one individual has a 7-repeat and an 11-repeat allele for D5S818, but another individual has a 13-repeat and a 15-repeat allele, then barring mutation, the two cannot be parent and child. This is the most powerful genetic information other than identity that the CODIS profiles contain – that two people are not parent and child.[26]

---

[26] The CODIS profiles cannot conclusively show whether two people are genetic siblings. It is possible, though highly

(Continued on following page)

Detecting rather than excluding parent-child relationships from profiles in a CODIS database is far more difficult. Some portion of people in the world will share at least one allele at each CODIS locus with any given person. Every one of these many individuals would be on a list of those people who could be a genetic parent of that child. For an "average" CODIS profile (one that contains the two alleles of median incidence at every locus), the probability of a random person sharing one allele at each locus is somewhat above 1/1000. Henry T. Greely, et al., *Family Ties: The Use of DNA Offender Databases to Catch Offenders' Kin*, 34 J.L. Med. & Ethics 248, 252 (2006). Thus, in a database of 10 million people, a person with an "average" profile would have about 10,000 candidates for being his parents or children. Someone with access to the CODIS profiles of two people could tell if they might be among the many thousands of possible parent-child pairs.

Beyond that, someone could use the number of alleles shared and the population frequencies of these alleles to estimate a "kinship index" for any possible genetic relationship (parent-child, siblings, uncle-aunt

---

unlikely, that two full siblings could have, by chance, inherited different alleles at each locus from each of their parents and thus not share *any* CODIS alleles. However, in some instances, the pattern of shared and unshared alleles can establish a distinct probability of relatedness. And, of course, a comparison of two profiles could establish whether two people were identical twins – these twins would share both alleles at each locus of their CODIS profiles.

and nephew-niece, cousins, grandparent-grandchild, and so on) based on any pair of CODIS profiles. The index would almost never be definitive for picking out relatives within a database. Most pairs with a large index value would not actually be relatives, and many unrelated pairs would have larger index values than would true relatives.

One could make much more accurate assessments of family relationships by using more STRs and other markers, but there are too few CODIS markers, with too few alleles, to do this well. *See, e.g.*, David H. Kaye, *The Genealogy Detectives: A Constitutional Analysis of "Familial Searching"*, 51 Am. Crim. L. Rev. No. 1 (forthcoming 2013), available at http://ssrn.com/abstract=2043091.

The frequencies of CODIS alleles often show similar patterns in populations across the globe – the same alleles tend to be common (or rare) in most populations – but there are variations in the frequencies of particular alleles in different populations. At D5S818, for example, the 11-repeat allele is about 50% more common in Caucasians than African-Americans. The 8-repeat allele is rare in both groups, but it is about 16 times more common in African-Americans. Butler, et al., *supra* note 14. These variations have nothing to do with the genetic characteristics that are associated with these groups, such as skin color. They are just the result of migrations and chance genetic history. *See, e.g.*, Richard S. Cooper, et al., *Race and Genomics*, 348 New Engl. J. Med. 1166, 1167 (2003); Kirk E. Lohmueller, *Graydon, et al.*

Provide No New Evidence that Forensic STR Loci Are Functional, 4 Forensic Sci. Int'l: Genetics 273 (2010).

A CODIS profile could be used to calculate probabilities that someone would be described as Caucasian, African-American, or Hispanic, but categorical inferences would not be very accurate,[27] and attempts to predict the census-type race of a person from a CODIS profile would seem pointless considering that apparent race already would be known.

Finally, we should note that both family connections and racial categories can provide minimal information about at least some disease probabilities. Caucasians are more likely than African-Americans to be diagnosed with cystic fibrosis; African-Americans are more likely to be diagnosed with sickle cell disease. But the combination of an inaccurate racial identification, shared genetic backgrounds ("admixture"), and a different incidence of a low-probability disease will not yield valuable or troubling information.[28]

---

[27] Some of the allele frequency differences used to make inferences will be the result of sampling variance, and census-type categories of "race" do not mirror bio-geographic ancestry. For example, some Hispanic-Americans are of entirely European ancestry.

[28] To take an extreme example, men are much more likely than women to be diagnosed with prostate cancer; women are much more likely to be diagnosed with cervical cancer. Being able to make a guess about whether someone is male or female will not provide much information about whether that person will be diagnosed with one of those diseases.

CONCLUSION

The Court should recognize that CODIS profiling is not the type of genetic testing that supplies significant information on disease risk or other physical or behavioral genetic traits.

Respectfully submitted,

MICHAEL L. FOREMAN
Counsel of Record

APPENDIX A

IDENTIFICATION OF *AMICI*

FREDERICK R. BIEBER has worked as a medical geneticist for 32 years and is Associate Professor of Pathology at Harvard Medical School. He is certified by the American Board of Medical Genetics and is a laboratory director of the Center for Advanced Molecular Diagnostics at Brigham and Women's Hospital. His writing includes papers on human genetics, pathology, forensic medicine, forensic DNA science, and familial searching in DNA databases. He was a member of the World Trade Center Kinship and Data Analysis Panel and the Hurricane Victim DNA Identification Expert Group following Hurricanes Katrina and Rita. He has served on advisory boards or as an advisor for the National DNA Databank of Canada, the National Institutes of Health, and the states of Connecticut, Massachusetts, and Virginia, and was a member of the Congressionally mandated DNA Advisory Board.

BRUCE BUDOWLE is Professor, Department of Forensic and Investigative Genetics, and Executive Director, Institute of Applied Genetics, at the University of North Texas Health Science Center. As a senior scientist and researcher for the FBI for 26 years, he was an architect of the CODIS system, a chair and member of the Scientific Working Group on DNA Methods, Chair of the Scientific Working Group on Microbial Genetics and Forensics, and Chair of the DNA Commission of the International Society of

Forensic Genetics. He was a principal advisor in efforts to identify victims from the World Trade Center attack and helped establish a mitochondrial DNA sequencing program to enable high throughput sequencing of human remains. He has published hundreds of articles and authored or coauthored books on molecular biology techniques, electrophoresis, protein detection, and microbial forensics. He also has carried out research on genetic risk factors for diseases such as insulin-dependent diabetes mellitus, melanoma, and acute lymphocytic leukemia. At UNTHSC his research focuses on human forensic identification, microbial forensics, and emerging infectious disease.

ARAVINDA CHAKRAVARTI is Professor, Departments of Medicine, Pediatrics, and Molecular Biology and Genetics, Johns Hopkins University Bloomberg School of Medicine and Department of Biostatistics. His laboratory, which is part of the Institute for Genetic Medicine, focuses on the development and applications of molecular genetic, genomic, and computational methods for understanding the features of complex disease gene architecture in birth defects, cardiovascular disorders, and mental illness. A member of the National Academies' Institute of Medicine, he has served on advisory committees for the National Institutes of Health and is an editorial board member of four genetics journals.

HENRY T. GREELY is the Deane F. and Kate Edelman Johnson Professor of Law, Stanford Law School. Director, Center for Law and the Biosciences; Professor (by courtesy) of Genetics, Stanford School of

Medicine; Chair, Steering Committee of the Center for Biomedical Ethics; and the founder and Director of the Stanford Interdisciplinary Group on Neuroscience and Society. A Fellow of the American Association for the Advancement of Science (AAAS), he is the coauthor of a chapter of the FJC *Reference Manual on Scientific Evidence* and has written extensively on ethical and legal issues raised by genetics, including both genetic genealogy and family forensic DNA searching. He is an additional author of this brief.

MITCHELL M. HOLLAND is Associate Professor, Biochemistry and Molecular Biology Department, and Director, Forensic Science Program, The Pennsylvania State University. A Fellow of the American Academy of Forensic Sciences, Dr. Holland was Senior Vice President for Operations and Laboratory Director, The Bode Technology Group; Scientific Laboratory Director and Head of Research, Armed Forces DNA Identification Laboratory, Armed Forces Institute of Pathology. His publications include papers on mitochondrial DNA and STR loci as used in human identification. He participated in many human remains cases involving military personnel as well as victims from the World Trade Center disasters and commercial airline accidents.

DAVID H. KAYE is a member of the graduate faculty of The Pennsylvania State University Forensic Science Program and Distinguished Professor and Weiss Family Scholar, School of Law. He also is Regents' Professor of Law Emeritus at Arizona State University, where he was the founding director of the Center

for the Law, Science, and Innovation and a Professor (by courtesy) in the School of Life Sciences. He served on the National Academy of Sciences Committee on DNA Forensic Science: An Update, was the legal reporter for National Commission on the Future of DNA Evidence, and is a coauthor of chapters on both statistics and DNA evidence in the Federal Judicial Center's (FJC's) *Reference Manual on Scientific Evidence*. With support from the Human Genome Project, he has written on the significance of law enforcement DNA databases for behavioral genetics research and on CODIS profiles as medical information. His research or commentary has appeared in journals of medicine, genetics, forensic science, and statistics, and psychology as well as law. He is the principal author of this brief.

HAIG H. KAZAZIAN, JR., is Professor of Genetics, Institute of Genetic Medicine, Johns Hopkins University. Formerly, he was Seymour Gray Professor of Genetics, Perelman School of Medicine, University of Pennsylvania and Chair of the Department of Genetics. Before going to Penn in 1994, he was Director of the Johns Hopkins Center for Medical Genetics. Dr. Kazazian discovered that transposable elements are active in human beings and cause disease through insertional mutagenesis. His laboratory studies the frequency of new insertions in the population, in cancers, and in other diseases, and is investigating the molecular diagnosis and treatment of hemophilia A. He is a member of the American Academy of Arts and Sciences, the Association of American Physicians,

the National Academies' Institute of Medicine, and a past president of the American Board of Medical Genetics. He served on both National Academy of Sciences Committees on DNA Technology in Forensic Science.

KENNETH K. KIDD is Professor of Genetics, Psychiatry, and Ecology and Evolutionary Biology, Yale University School of Medicine. He has pursued research in many areas of human genetics, including medical genetics (studies of neuropsychiatric disorders and simple Mendelian disorders), gene mapping (both physical and genetic), database design for modern genetic data, and a variety of molecular methodologies. His laboratory examines human genome diversity at the DNA level. With support from the National Science Foundation, he established ALFRED, the ALlele FREquency Database as a resource for the international scientific community. Dr. Kidd is a certified Medical Geneticist of the American Board of Medical Genetics and a Fellow of the American Association for the Advancement of Science. He has served on multiple editorial boards and federal advisory committees, including advisory panels for DNA identification of victims of the World Trade Center attack and Hurricane Katrina.

TIM D. SPECTOR is Professor of Genetic Epidemiology, Kings College London and director of the TwinsUK twin register of 12,000 adult twins with genetic information. He trained as a physician and in Epidemiology and Genetics and runs the register, which is the most deeply genotyped and phenotyped

in the world. Through Genome Wide Association Studies his group has found over 300 novel gene loci in over 30 disease areas including osteoporosis, osteoarthritis, and melanoma. He has published over 600 research articles on common diseases and traits. A Senior Investigator for the National Institute for Health Research of the United Kingdom's National Health Service, he also led the Wellcome Trust MuTHER study, which discovered how a "master regulator" gene can cause a cascade of metabolic effects in other genes that could contribute to diabetes and other conditions. Dr. Spector also is joint chair of the VISIGEN visible traits global genetics consortium and has published articles on ancestry, hair and eye color.

HUNTINGTON F. WILLARD is Director, Institute for Genome Sciences & Policy, and Nanaline H. Duke Professor of Genome Sciences at Duke University. He previously held faculty positions at the University of Toronto, Stanford University, and Case Western University, where he was Chairman of the Department of Genetics. He is the author or coauthor of over 300 scientific publications in human genetics and genomics, including the widely used textbook Genetics in Medicine. He has served on the editorial boards of numerous scientific journals and was co-founder of Human Molecular Genetics. Dr. Willard is a previous President of the American Society of Human Genetics and is a member of the American Academy of Arts & Sciences. He served on the Secretary's Advisory Committee for Genetics, Health & Society for the

Secretary of the Department of Health and Human Services.

APPENDIX B

SOME STUDIES REPORTING DISEASES ASSOCIATED WITH FINGERPRINT FEATURES

Alter, Milton & Robert Schulenberg, *Dermatoglyphics in Congenital Heart Disease*, 41 Circulation 49 (1970)

Avila, M.T., et al., *Neurodevelopmental Interactions Conferring Risk for Schizophrenia: A Study of Dermatoglyphic Markers in Patients and Relatives*, 29 Schizophrenia Bulletin 595 (2003)

Bramona, E., *Dermatoglyphics and Schizophrenia: A Meta-analysis and Investigation of the Impact of Obstetric Complications upon a-b Ridge Count*, 75 Schizophrenia Research 399 (2005)

Bukelo, M.J., *Palmar Dermatoglyphics in Children with Acute Lymphoblastic Leukemia – A Preliminary Investigation*, 18 J. Forensic Leg. Med. 115 (2011)

Chakraborty, D., et al., *Dermatoglyphic Analysis in Malay Subjects with Bipolar Mood Disorder*, 56 Med. J. Malaysia 223 (2001)

Chintamani, et al., *Qualitative and Quantitative Dermatoglyphic Traits in Patients with Breast Cancer: a Prospective Clinical Study*, 13 BMC Cancer 7 (2007)

Cvjeticanin, M. & A. Polovina, *Quantitative Analysis of Digitopalmar Dermatoglyphics in Male Children*

with Central Nervous System Lesion by Quantification of Clinical Parameters of Locomotor Disorder, 53 Acta Medica Croatica 5 (1999)

Dogramaci, A.C., et al., *Dermatoglyphs in Patients with Beta-thalassemia Major and Their Thalassemia Carrier Parents*, 33 Collegium Antropologicum 607 (2009)

Hiroshi Schiono, *Dermatoglyphics in Medicine*, 7 Am. J. Forensic Med. & Pathology 120 (1986)

Kahn, H.S., et al., *A Fingerprint Marker from Early Gestation Associated with Diabetes in Middle Age*, 38 Int'l J. Epidemiology 101 (2009)

Kelly, B.D., et al., *Neurological Soft Signs and Dermatoglyphic Anomalies in Twins with Schizophrenia*, 19 European Psych. 159 (2004)

Markow, Therese Ann & Kevin Wandler, *Fluctuating Dermatoglyphic Asymmetry and the Genetics of Liability to Schizophrenia*, 19 Psychiatric Research 323 (1986)

Nezhad, Hossein Rezaei & Nasser Mahdavi Shah. *Application of Dermatoglyphic Traits for Diagnosis of Diabetic Type 1 Patients*, 1 Int'l J. Environmental Sci. & Development 36 (2010)

Polovina, S., et al., *Qualitative Dermatoglyphic Traits in Brachial Plexus Palsy*, 31 Collegium Antropologicum 1077 (2007)

Pulliam, T.J. & M.M. Schuster, *Congenital Markers for Chronic Intestinal Pseudo-obstruction*, 90 Am. J. Gastroenterology 922 (1995)

Reed, Terry & John M. Opitz, *Dermatoglyphics in Medicine – Problems and Use in Suspected Chromosome Abnormalities*, 8 Am. J. Med. Genetics 411 (1981)

Rosa, A., et al., *Further Evidence that Congenital Dermatoglyphic Abnormalities Are Associated with Psychosis: A Twin Study*, 28 Schizophrenia Bull. 697 (2002)

Schaumann, B.A. & J.M. Opitz, *Clinical Aspects of Dermatoglyphics*, 27 Birth Defects Original Articles Series 193 (1991)

Schiono, Hiroshi, *Dermatoglyphics in Medicine*, 7 Am. J. Forensic Med. & Pathology 120 (1986)

Shemetova, M.V., et al., *Specific Dermatoglyphic Traits of Patients with Occupational Allergic Bronchitis*, 36 Genetika 100 (2000)

Solhi, H., et al., *Diagnostic Value of Fingerprint Patterns: An Explorative Study on Betathalassemia Diagnosis*, 36 Bangladesh Med. Res Council Bull. 27 (2010)

Tay, J.S., et al., *Dermatoglyphs in Children with Mitral Valve Prolapse*, 22 J. Med. Genetics 135 (1985)

Todd, E.S, *Characterization of Dermatoglyphics in PHOX2B-confirmed Congenital Central Hypoventilation Syndrome*, 118 Pediatrics 408 (2006)

van Oel, C.J., et al., *Differentiating Between Low and High Susceptibility to Schizophrenia in Twins: the Significance of Dermatoglyphic Indices in Relation to Other Determinants of Brain Development*, 52 Schizophrenia Research 181 (2001)

Verbov, Julian, *Clinical Significance and Genetics of Epidermal Ridges – A Review of Dermatoglyphics*, 54 J. Investigative Dermatology 261 (1970)

Weinreb, Herman J., *Fingerprint Patterns in Alzheimer's Disease*, 42 Archives Neurology 50 (1985)

Weizman, Z., et al., *Dermatoglyphic (Fingerprint) Patterns in Coeliac Disease*, 10 J. Pediatric Gastroenterology & Nutrition 451 (1990)

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JAN 2 - 2013
OFFICE OF THE CLERK

No. 12-207

IN THE
Supreme Court of the United States

STATE OF MARYLAND,

Petitioner,

v.

ALONZO JAY KING, JR.,

Respondent.

On Writ Of Certiorari
To The Court Of Appeals Of Maryland

BRIEF OF THE GLOBAL ALLIANCE FOR RAPID DNA TESTING AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JOHN W. WOLFE
DLA PIPER LLP
701 Fifth Avenue
Suite 7000
Seattle, WA 98104
(206) 839-4800

THEODORE B. OLSON
Counsel of Record
AMIR C. TAYRANI
ERIK R. ZIMMERMAN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tolson@gibsondunn.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. FORENSIC DNA ANALYSIS IS AN EXTRAORDINARILY POWERFUL METHOD FOR IDENTIFYING—AND ONLY FOR IDENTIFYING—SUSPECTED PERPETRATORS OF CRIMINAL OFFENSES 3

II. FROM A FOURTH AMENDMENT PERSPECTIVE, FORENSIC DNA ANALYSIS IS NO DIFFERENT FROM UNIVERSALLY APPROVED FINGERPRINT ANALYSIS 10

A. It Is Well Settled That Taking And Analyzing Fingerprint Samples From Arrestees Is Constitutional 11

B. The Constitutionality Of Forensic DNA Analysis Follows Inexorably From The Constitutionality Of Fingerprint Analysis 13

III. THE EFFORTS OF RESPONDENT AND THE MARYLAND COURT OF APPEALS TO DISTINGUISH FORENSIC DNA ANALYSIS FROM FINGERPRINT ANALYSIS ARE UNAVAILING 16

A. It Is Irrelevant That *Other* Types Of DNA Analysis Could Potentially Intrude Upon An Arrestee's Privacy 16

B. There Is No Scientific Evidence That Sensitive Genetic Information Can Be Gleaned From The DNA Analysis At Issue Here.....18

C. Any Purported Distinction Based On The Outward Nature Of Fingerprints Versus The Inward Nature Of DNA Is Immaterial 22

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

Anderson v. Commonwealth,
650 S.E.2d 702 (Va. 2007).....14

Boroian v. Mueller,
616 F.3d 60 (1st Cir. 2010).....14, 21

Davis v. Mississippi,
394 U.S. 721 (1969).....12

Dist. Attorney's Office for Third Judicial Dist. v. Osborne,
557 U.S. 52 (2009).....3, 5, 15

Dow Chem. Co. v. United States,
476 U.S. 227 (1986).....21

Floyd v. State,
645 S.W.2d 690 (Ark. 1983).....12

Hayes v. Florida,
470 U.S. 811 (1985).....12, 13

Jones v. Murray,
962 F.2d 302 (4th Cir. 1992).....2, 14

Napolitano v. United States,
340 F.2d 313 (1st Cir. 1965).....11

Samson v. California,
547 U.S. 843 (2006).....10

Schmerber v. California,
384 U.S. 757 (1966).....22

Skinner v. Ry. Labor Execs.' Ass'n,
489 U.S. 602 (1989) 22

Smith v. United States,
324 F.2d 879 (D.C. Cir. 1963) 2, 11

State v. Raines,
857 A.2d 19 (Md. 2004) 14, 16

United States v. Karo,
468 U.S. 705 (1984) 17

United States v. Kelly,
55 F.2d 67 (2d Cir. 1932) 1, 11, 14

United States v. Knights,
534 U.S. 112 (2001) 11

United States v. Mitchell,
652 F.3d 387 (3d Cir. 2011) 14, 15

STATUTES

42 U.S.C. § 14132 17

Md. Code, Pub. Safety § 2-512 17

OTHER AUTHORITIES

John M. Butler, *Advanced Topics in Forensic DNA Typing: Methodology* (2012) 19, 20, 21

John M. Butler, *Fundamentals of Forensic DNA Typing* (2009) 3, 4, 5, 6, 7, 8, 9

Cal. Dep't of Justice, Office of the Attorney Gen., *BFS DNA Frequently Asked Questions, Searching the CAL-DNA Data Bank and CODIS*, http://oag.ca.gov/bfs/prop69/faqs 20

Sara H. Katsanis & Jennifer K. Wagner, *Characterization of the Standard and Recommended CODIS Markers*, J. of Forensic Sci. (2012) 6, 19, 21

C.P. Kimpton et al., *Report on the Second EDNAP Collaborative STR Exercise*, Forensic Sci. Int'l (1995) 20

Gina Kolata, *Bits of Mystery DNA, Far From 'Junk,' Play Crucial Role*, N.Y. Times, Sept. 6, 2012, at A1 ..... 18, 19

Karen Kreeger, *Reconciling ENCODE and CODIS*, Penn Medicine News Blog (Sept. 18, 2012), http://news.pennmedicine.org/blog/2012/09/reconciling-encode-and-codis.html 19

Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (4th ed.) 12

Scientific Working Group on DNA Analysis Methods, *SWGDAM Executive Board Considerations for Claims that the CODIS Core Loci are "Associated" with Medical Conditions / Diseases* (Sept. 17, 2012), http://www.swgdam.org/SWGDAM_State_v_Abernathy.pdf 21

U.S. Dep't of Justice, Fed. Bureau of Investigation, *CODIS*, http://www.fbi.gov/about-us/lab/codis/codis-brochure-2010 ..... 6, 9, 10

U.S. Dep't of Justice, Fed. Bureau of Investigation, *Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System*, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet 9, 10

U.S. Dep't of Justice, Nat'l Comm'n on the Future of DNA Evidence, *The Future of Forensic DNA Testing* (NCJ 183697, 2000), www.ncjrs.gov/pdffiles1/nij/183697.pdf. 5, 6

Jennifer K. Wagner, *ENCODE, CODIS, and the Urgent Need to Focus on What is Scientifically and Legally Relevant to the DNA Fingerprinting Debate*, Genomics Law Report (Sept. 21, 2012), http://www.genomicslawreport.com/index.php/2012/09/21/encode-codis-and-the-urgent-need-to-focus-on-what-is-scientifically-and-legally-relevant-to-the-dna-fingerprinting-debate/ 7, 20

Sandy L. Zabell, *Fingerprint Evidence*, 13 J. L. & Pol'y 143 (2005).....15

BRIEF OF THE GLOBAL ALLIANCE FOR RAPID DNA TESTING AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

Amicus Global Alliance for Rapid DNA Testing is an association of business organizations with a common interest in promoting consensus on issues relating to the widespread implementation of biometric technologies for rapid DNA identification. The mission of the Global Alliance is to drive the development and utilization of rapid DNA technology for identification purposes in order to solve crime more quickly, prevent future victimization, and ensure the protection of the innocent. Its activities include engaging in advocacy and making recommendations on policy, legislation, standardization, proficiency, and training requirements.

SUMMARY OF ARGUMENT

For nearly a century, it has been well established that the Fourth Amendment permits law enforcement officers to conduct forensic fingerprint analysis pursuant to a valid arrest for purposes of identification. *See, e.g., United States v. Kelly*, 55 F.2d 67, 69-70 (2d Cir. 1932). Courts have recognized that the state has a strong interest in identifying an arrestee

---

[1] Pursuant to this Court's Rule 37.3(a), *amicus* states that petitioner and respondent have filed letters with the Clerk granting blanket consent to the filing of *amicus* briefs. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

through his fingerprints because doing so is "relevant not only to solving the crime for which the suspect is arrested, but also for maintaining a permanent record to solve other past and future crimes." *Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992). And courts have universally agreed that this state interest in identification far outweighs any expectation of privacy that a person subject to a lawful arrest may have in his own identity. *See, e.g., Smith v. United States*, 324 F.2d 879, 882 (D.C. Cir. 1963) ("[I]t is elementary that a person in lawful custody may be required to submit to photographing and fingerprinting as part of routine identification processes.") (citations omitted).

The forensic DNA analysis at issue in this case is no different, for Fourth Amendment purposes, from fingerprint analysis. Forensic DNA analysis is based on science and technology that make it an exceptionally valuable tool for identifying the suspected perpetrator of a crime. Indeed, forensic DNA analysis enables law enforcement to determine a suspect's identity with near absolute certainty, and is therefore even *more* valuable and accurate than fingerprinting. At the same time, the science and technology underlying the forensic DNA analysis at issue here make it incapable of meaningfully revealing any other sensitive information contained in the suspect's DNA. Thus, like fingerprint analysis, forensic DNA analysis advances an exceedingly important state interest without intruding upon any cognizable privacy interest. The Fourth Amendment inquiry therefore tips decidedly in favor of the state.

The contrary conclusion of the Maryland Court of Appeals rests on a fundamental misapprehension of the science and technology behind forensic DNA analysis, and disregards the stringent legal safe-

guards that are in place to ensure that DNA samples are used only to determine a suspect's identity—and for *no other* purpose. The Court should reverse the decision below and preserve the ability of law enforcement to use this powerful tool for identifying and apprehending criminal suspects.

ARGUMENT

I. FORENSIC DNA ANALYSIS IS AN EXTRAORDINARILY POWERFUL METHOD FOR IDENTIFYING—AND ONLY FOR IDENTIFYING—SUSPECTED PERPETRATORS OF CRIMINAL OFFENSES.

This Court has recognized that "DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty." *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 55 (2009). That is as far as the forensic DNA analysis at issue in this case extends. This analysis "is *only* useful for human identity testing," and thus does not disclose any other potentially private information about the person whose DNA is being analyzed. John M. Butler, *Fundamentals of Forensic DNA Typing* 279 (2009) (hereinafter Butler, *Fundamentals*) (emphasis added); *see also Osborne*, 557 U.S. at 82 (Alito, J., concurring) (recognizing that Professor Butler "is said to have written the canonical text on forensic DNA typing") (internal quotation marks omitted). An overview of the science and technology on which the DNA analysis before the Court is based demonstrates why it is such a powerful tool for the purpose of identification—and only for that purpose.

A. "Coding" and "Noncoding" DNA

DNA is a chemical substance that stores information used to replicate cells and produce proteins

that are necessary for cells to function. Butler, *Fundamentals*, *supra*, at 19. DNA stores that information in a sequence of "bases," much as a book stores information in a sequence of letters. *Id.* at 20. The four bases that make up DNA are abbreviated by the letters A, C, G, and T. *Id.* DNA is composed of two strands, and the bases on one strand link to the bases on the other, forming "base pairs." *Id.* at 21. A always pairs with T, and C always pairs with G. *Id.*

The DNA used for standard forensic analysis is located within the chromosomes in the nucleus of the cell. Butler, *Fundamentals*, *supra*, at 23. (Some DNA, known as mitochondrial DNA, also exists outside the nucleus; that type of DNA is not pertinent here. *See id.* at 19.) Normal human cells contain 46 chromosomes, arranged in pairs. Half of the chromosomes are inherited from one's mother, and half from one's father. *Id.* at 23-24.

Chromosomes have "coding" and "noncoding" regions of DNA. Butler, *Fundamentals*, *supra*, at 25. The coding regions are known as genes, and the sequences of bases within these regions store the information that a cell uses to make proteins. *Id.* Approximately 5% of human DNA is made up of genes. *Id.* The remaining 95% of DNA is noncoding, and the sequences of bases in these regions do not store information used to make proteins. *Id.* These noncoding regions are sometimes referred to as "junk" DNA. *Id.*

At many positions—or "loci"—on the chromosomes, short sequences of bases are repeated. These loci are called "short tandem repeats," or "STRs." Butler, *Fundamentals*, *supra*, at 148. The number of repeats at a particular STR locus varies from person

to person. For example, the sequence "GATA" might be repeated four times at a particular STR locus in one person's DNA, whereas the same sequence might be repeated five times at the same STR locus in another person's DNA. *Id.* at 148-49. Each potential number of repeats at an STR locus is known as an "allele." Thus, in the above example, four repeats would be one allele, and five repeats would be another allele. *Id.* at 25, 149. Each STR locus typically has 7 to 15 alleles—*i.e.*, there are 7 to 15 different numbers of repeats that can be found at that locus. *See* U.S. Dep't of Justice, Nat'l Comm'n on the Future of DNA Evidence, *The Future of Forensic DNA Testing* 17 (NCJ 183697, 2000), www.ncjrs.gov/pdffiles1/nij/183697.pdf.

STRs are useful for purposes of identification because (1) if two DNA samples have a different number of repeats at the same STR locus, then they necessarily came from different persons, and (2) the number of repeats at each STR locus is highly variable between persons. *See* Butler, *Fundamentals*, *supra*, at 148. Although two persons may share the same number of repeats at a single STR locus, as the number of loci examined increases, it becomes astronomically unlikely that two persons will share the same number of repeats at every locus. U.S. Dep't of Justice, Nat'l Comm'n on the Future of DNA Evidence, *supra*, at 25; *see also Osborne*, 557 U.S. at 62 (STR analysis often makes it "possible to determine whether a biological tissue matches a suspect with near certainty").

B. The CODIS Database

Standard forensic DNA analysis in the United States—which is the type of DNA analysis at issue in this case (*see* Pet. App. 21a)—measures the number

of repeats of the base sequences at 13 predetermined STR loci. Butler, *Fundamentals*, *supra*, at 154. These are the loci included in the FBI's DNA database—known as the Combined DNA Index System, or CODIS—which uses a common set of loci to facilitate comparisons of DNA analysis across different jurisdictions. *Id.* at 154-55. These 13 "CODIS core loci" were chosen because they have extraordinary power to differentiate between individuals: The probability of a random match of every allele between two persons at all 13 loci is less than one in a *trillion*. *Id.* at 155.

The 13 CODIS core loci were also selected to protect individual privacy. "[T]he 13 CODIS core STR loci[ ] are in noncoding regions of the DNA and are not known to have any association with a genetic disease or any other genetic predisposition." Butler, *Fundamentals*, *supra*, at 279. Thus, "[w]ith the STR markers in use today, little to no information can be gleaned regarding ethnicity, predisposition to disease, or other phenotypic characteristics such as eye color, height, or hair color." *Id.* at 6; *see also* U.S. Dep't of Justice, Nat'l Comm'n on the Future of DNA Evidence, *supra*, at 35 ("The 13 STR loci . . . are not associated with specific, observable traits."); U.S. Dep't of Justice, Fed. Bureau of Investigation, *CODIS* 2 (hereinafter FBI, *CODIS*) ("These regions of DNA have no known association with medical conditions, defects or physical characteristics."), http://www.fbi.gov/about-us/lab/codis/codis-brochure-2010. Indeed, a recent survey of the scientific literature confirmed that the 13 CODIS core loci "are not at present revealing information beyond identification." Sara H. Katsanis & Jennifer K. Wagner,

Characterization of the Standard and Recommended CODIS Markers, J. of Forensic Sci. 3 (2012).[2]

To determine the number of repeats at each STR locus, modern DNA analysis uses a process known as the polymerase chain reaction ("PCR"). Butler, *Fundamentals*, *supra*, at 125. Invented in 1985 by Kary Mullis—who received the Nobel Prize in Chemistry for his work on PCR in 1993—"PCR has revolutionized molecular biology with the ability to make hundreds of millions of copies of a specific sequence of DNA in a matter of only a few hours." *Id.* This copying process is critical to forensic DNA analysis because it allows law enforcement officers to analyze even small, low-quality samples of DNA found at crime scenes. *Id.*

A biological sample can be obtained either from a crime scene, or from a person who has been arrested or convicted, which is generally accomplished through the use of a swab applied to the inside of the cheek. The DNA is extracted from the sample, and

---

[2] In forensic DNA analysis, an additional test is often performed in conjunction with STR analysis to determine whether the source of a DNA sample was male or female. *See* Butler, *Fundamentals*, *supra*, at 166. There also may be some association between particular STR alleles and a person's race, but "the statistical correlations are crude at best." Jennifer K. Wagner, *ENCODE, CODIS, and the Urgent Need to Focus on What is Scientifically and Legally Relevant to the DNA Fingerprinting Debate*, Genomics Law Report (Sept. 21, 2012), http://www.genomicslawreport.com/index.php/2012/09/21/encode-codis-and-the-urgent-need-to-focus-on-what-is-scientifically-and-legally-relevant-to-the-dna-fingerprinting-debate/. Information regarding a person's race or sex, of course, "is already decipherable from mug shot photos, so its redundant availability in the form of CODIS profiles is, or at least should be, unlikely to cause any notable controversy." *Id.*

the amount of human DNA in the sample (as opposed to DNA from other sources, such as bacteria) is measured. *See generally* Butler, *Fundamentals*, *supra*, at 99-124. PCR then uses chemical primers to target the sequences of bases at the STR loci to be analyzed, and uses multiple cycles of heating and cooling to produce millions of copies of those particular sequences. *See id.* at 126-27, 138-39. The 13 CODIS core loci can be amplified simultaneously in this manner using commercially available STR kits. *Id.* at 158.

The PCR process produces millions of DNA fragments containing the target STR sequences. These fragments are then separated so that the number of repeats in each sequence can be measured. Butler, *Fundamentals*, *supra*, at 175. The separation is achieved through a process called electrophoresis, which involves the application of an electric field to the DNA fragments. *Id.* at 176. When the fragments are placed in a gel—or, in newer instruments, a capillary filled with a gel-like substance—and the electric field is applied, the fragments move, and the smaller fragments move faster than the larger ones. *See id.* at 178, 180. Thus, the STR sequences with more repeats separate from the STR sequences with fewer repeats. Fluorescent dyes that are attached to the DNA fragments are then illuminated by a laser to measure how quickly each fragment has moved. *See id.* at 194-95. By comparing the speed at which a fragment in the sample has moved to the speed at which a fragment containing a known number of repeats would move, one can determine the number of repeats in the sample fragment. *See id.* at 207-11.

Ultimately, this process measures the number of repeats at each STR locus in the sample. This in-

formation is recorded in the form of a DNA profile, which consists of a series of 26 numbers. Those numbers represent the number of repeats at each of the 13 STR loci on the chromosomes inherited from the subject's mother, plus the number of repeats at each of the 13 STR loci on the chromosomes inherited from the subject's father. *See* Butler, *Fundamentals*, *supra*, at 205, 271. The DNA profile is then uploaded to the CODIS database. CODIS consists of several indexes, including (1) the forensic index, which contains DNA profiles developed from crime scene evidence; (2) the convicted offender index, which contains DNA profiles of individuals convicted of crimes; and (3) the arrestee index, which contains DNA profiles of arrested persons. FBI, *CODIS*, *supra*, at 2. CODIS does not contain names or other personal identifiers, and instead contains only the sequence of numbers constituting the DNA profile, a specimen identification number, and information identifying the agency and personnel associated with the profile. U.S. Dep't of Justice, Fed. Bureau of Investigation, *Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System* (hereinafter FBI, *FAQs*), http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet.

If the CODIS program finds that the uploaded DNA profile matches another profile in the database—*i.e.*, the numbers of repeats are the same at each of the STR loci in the samples—the crime laboratories that submitted the samples exchange information and perform additional testing to verify the match. *See* FBI, *FAQs*, *supra*. Because the probability of a random match is infinitesimally small, a match between two samples in CODIS establishes with near certainty that both samples came

from the same person. Law enforcement officers can utilize that information to conduct additional investigation or bring additional charges. Alternatively, the absence of a match can be used to establish that a suspect is not connected to a particular crime.

Since its inception in the 1990s, CODIS has been extraordinarily successful in assisting law enforcement officers in identifying suspected perpetrators of crimes. As of June 2012, CODIS had produced over 150,000 "Offender Hits," which occur when—as in this case—"one or more forensic profiles are linked to a convicted offender, arrestee, or legal profile." FBI, *CODIS*, *supra*, at 1. CODIS had also produced nearly 30,000 "Forensic Hits," *id.*, which occur when DNA profiles from two crime scenes are linked, but the offender is unknown. FBI, *FAQs*, *supra*. And CODIS had aided in more than 170,000 criminal investigations. FBI, *CODIS*, *supra*, at 1.

II. From A Fourth Amendment Perspective, Forensic DNA Analysis Is No Different From Universally Approved Fingerprint Analysis.

Because the forensic analysis at issue in this case is an exceptionally valuable tool for identifying an arrestee—and does not disclose any other information about the person under arrest—it is no less valid under the Fourth Amendment than long-accepted forensic fingerprint analysis. The relevant question for each type of analysis is whether the analysis is "reasonable," which "'is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Samson v. California*, 547 U.S. 843, 848 (2006) (quoting *United*

States v. Knights, 534 U.S. 112, 118-19 (2001)). This balancing test unambiguously favors the state with respect to forensic fingerprint analysis—and tips even further in the state's favor with respect to forensic DNA analysis.

A. It Is Well Settled That Taking And Analyzing Fingerprint Samples From Arrestees Is Constitutional.

The constitutionality of taking and analyzing fingerprint samples from persons subject to a lawful arrest has never been subject to serious doubt. Eighty years ago, in *United States v. Kelly*, 55 F.2d 67 (2d Cir. 1932), the Second Circuit found "no ground in reason or authority for interfering with [this] method of identifying persons charged with crime which," by that time, had "become widely known and frequently practiced." *Id.* at 70. "Finger printing seems to be no more," the Second Circuit explained, "than an extension of methods of identification long used in dealing with persons under arrest for real or supposed violations of the criminal laws," and was "known to be a very certain means devised by modern science to reach the desired end." *Id.* at 69. Indeed, "[a]s a physical invasion it amounts to almost nothing," and thus fingerprint analysis "can really be objected to only because it may furnish strong evidence of a man's guilt." *Id.* at 70.

Courts have universally agreed with *Kelly*. In *Smith v. United States*, 324 F.2d 879 (D.C. Cir. 1963), for example, the D.C. Circuit deemed it "elementary that a person in lawful custody may be required to submit to photographing and fingerprinting as part of routine identification processes." *Id.* at 882 (citations omitted); *see also, e.g.*, *Napolitano v. United States*, 340 F.2d 313, 314 (1st Cir. 1965)

("Taking of fingerprints in such circumstances is universally standard procedure, and no violation of constitutional rights."); *Floyd v. State*, 645 S.W.2d 690, 692 (Ark. 1983) (when a person is "legally in custody of the state[,] the giving of the fingerprints is a routine matter which is within the discretion of the police department"). Indeed, the leading treatise on the Fourth Amendment describes "the taking of the arrestee's fingerprints" as the "most obvious example" of the "types of inspection-of-the-body procedures which constitute such a minor intrusion that they . . . are inherently reasonable when made incident to a lawful custodial arrest." 3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 5.3 (4th ed.). As a categorical matter, "[f]ingerprinting, as a routine part of the booking process, is justified by the legitimate interest of the government in knowing for an absolute certainty the identity of the person arrested, in knowing whether he is wanted elsewhere, and in ensuring his identification in the event he flees prosecution." *Id.*

Although this Court has not expressly addressed the issue, the reasoning of its Fourth Amendment jurisprudence is in full accord with these lower-court decisions and unambiguously establishes that fingerprinting upon a valid arrest is consistent with the Fourth Amendment. In *Davis v. Mississippi*, 394 U.S. 721 (1969), for example, this Court held that fingerprints obtained at a police station pursuant to an *unlawful* detention were required to be suppressed, but recognized that fingerprinting itself "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." *Id.* at 727. Similarly, in *Hayes v. Florida*, 470 U.S. 811 (1985), this Court held that the Fourth Amendment requires probable cause before a person

may be seized and transported to a police station for fingerprinting, but suggested that "a brief detention in the field for the purpose of fingerprinting, where there is only reasonable suspicion not amounting to probable cause," would be constitutional. *Id.* at 816.

Thus, both *Davis* and *Hayes* recognized the minimal invasion of privacy occasioned by fingerprinting. Moreover, the Court's decisions in both cases turned on the conclusion that the detentions at issue were invalid. If fingerprinting even upon a *valid* arrest were unconstitutional, however, the Court would have had no reason to analyze the legality of the detentions in *Davis* and *Hayes*. The two decisions therefore leave no doubt about the constitutionality of collecting and analyzing fingerprint samples from persons lawfully taken into custody.

B. The Constitutionality Of Forensic DNA Analysis Follows Inexorably From The Constitutionality Of Fingerprint Analysis.

The practical and legal considerations that establish the constitutionality of forensic fingerprint analysis as part of routine booking procedures are no less applicable to forensic DNA analysis.

Forensic DNA analysis conducted pursuant to a lawful arrest serves the same government interest as fingerprint analysis—it identifies the person in custody, and thus enables law enforcement officers to determine whether that person is linked to other criminal offenses. And forensic DNA analysis constitutes no greater intrusion on the privacy interests of an arrestee than fingerprint analysis because, as a matter of science and technology, forensic DNA analysis does not meaningfully reveal any information about a person *apart from* his identity. Thus, the

Second Circuit's description of forensic fingerprint analysis eighty years ago applies with equal force to forensic DNA analysis today: Forensic DNA analysis is "no more than an extension of methods of identification long used in dealing with persons under arrest for real or supposed violations of the criminal laws," and "can really be objected to only because it may furnish strong evidence of a man's guilt." *Kelly*, 55 F.2d at 69, 70.

Numerous courts have recognized that forensic DNA analysis is analogous to forensic fingerprint analysis for purposes of the Fourth Amendment. The Third Circuit, for example, has "conclude[d] that a DNA profile is used solely as an accurate, unique, identifying marker—in other words, as fingerprints for the twenty-first century." *United States v. Mitchell*, 652 F.3d 387, 410 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1741 (2012). The Fourth Circuit has similarly recognized that "[t]he governmental justification for this form of identification . . . relies on no argument different in kind from that traditionally advanced for taking fingerprints and photographs." *Jones v. Murray*, 962 F.2d 302, 307 (4th Cir. 1992). The Maryland Court of Appeals itself previously embraced this analogy in holding that the Fourth Amendment permitted forensic DNA analysis of convicted persons, recognizing that the purpose of a DNA profile "is akin to that of a fingerprint" because "[t]he DNA profile . . . serves the purpose of increasing the efficiency and accuracy in identifying individuals." *State v. Raines*, 857 A.2d 19, 33 (Md. 2004); *see also, e.g.*, *Boroian v. Mueller*, 616 F.3d 60, 66 (1st Cir. 2010) ("CODIS currently functions much like a traditional fingerprint database"); *Anderson v. Commonwealth*, 650 S.E.2d 702, 705 (Va. 2007) ("A DNA sample of the accused taken upon arrest, while more revealing,

is no different in character than acquiring fingerprints upon arrest.").

In fact, the 21st century science and technology on which forensic DNA analysis is based render it a *more powerful* method of identification than fingerprint analysis because they enable law-enforcement officials to determine a suspect's identity to a degree of near-absolute certainty that was impossible to obtain through pre-DNA methods. *See, e.g., Mitchell*, 652 F.3d at 413 ("DNA profiling serves this interest [in identification] better than fingerprinting"); Sandy L. Zabell, *Fingerprint Evidence*, 13 J. L. & Pol'y 143, 178 (2005) (contrasting the objective nature of DNA analysis with the subjective nature of fingerprint analysis); *see also Osborne*, 557 U.S. at 62 ("Modern DNA testing can provide powerful new evidence unlike anything known before."). The state therefore has an even *stronger* interest in performing forensic DNA analysis pursuant to a valid arrest than in performing fingerprint analysis.

Accordingly, the constitutionality of the forensic DNA analysis in this case follows *a fortiori* from the constitutionality of forensic fingerprint analysis because DNA testing is a more powerful identification tool—and no more intrusive—than traditional fingerprinting. Indeed, because the two forms of forensic analysis are so similar for Fourth Amendment purposes, if the Court were to hold that the forensic DNA analysis at issue here violates the Fourth Amendment, it would inevitably create confusion as to whether fingerprint analysis, which has been a part of routine booking procedures for almost a century, remains permissible. That constitutionally unwarranted outcome would shake the very foundation of modern criminal investigation.

III. The Efforts Of Respondent And The Maryland Court Of Appeals To Distinguish Forensic DNA Analysis From Fingerprint Analysis Are Unavailing.

Although the Maryland Court of Appeals previously acknowledged that forensic DNA analysis is analogous to forensic fingerprint analysis under the Fourth Amendment, *see Raines*, 857 A.2d at 33, both that court and respondent have attempted to distinguish the DNA analysis in this case from fingerprinting on several grounds. None has merit.

A. It Is Irrelevant That *Other* Types Of DNA Analysis Could Potentially Intrude Upon An Arrestee's Privacy.

The Maryland Court of Appeals asserted that "[t]he information derived from a fingerprint is related only to physical characteristics and can be used to identify a person, but no more," whereas "[a] DNA sample . . . contains within it unarguably much more than a person's identity," including a "vast genetic treasure map." Pet. App. 61a. To be sure, sensitive genetic information can be extracted from a DNA sample. But that information *cannot* be extracted using the forensic DNA analysis at issue in this case because that analysis is limited to the examination of the 13 CODIS core loci, which are located in the noncoding regions of the chromosomes. *See supra* pp. 5-6. Analyzing those loci thus does not meaningfully reveal *any* sensitive genetic information—much less produce a "vast genetic treasure map."

Under the Fourth Amendment, a minimally invasive search is not unconstitutional simply because law enforcement officers also have the opportunity to conduct a *more* invasive search. Indeed, this Court

has "never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment." *United States v. Karo*, 468 U.S. 705, 712 (1984). "A holding to that effect," the Court explained in *Karo*, "would mean that a policeman walking down the street carrying a parabolic microphone capable of picking up conversations in nearby homes would be engaging in a search even if the microphone were not turned on." *Id.* But "[i]t is the *exploitation* of technological advances that implicates the Fourth Amendment, not their mere existence." *Id.* (emphasis added). Thus, it is irrelevant for purposes of the Fourth Amendment that state officials could conduct a DNA analysis *different* from the one at issue in this case that would reveal sensitive genetic information.

As a practical matter, moreover, there is no basis for concluding that government officials might attempt to glean any such information from an arrestee's DNA. Maryland law authorizes forensic DNA analysis *only* for the purpose of identification, and imposes substantial criminal penalties—including up to five years in prison and a fine of up to $5,000—for performing more invasive forms of DNA analysis. *See* Md. Code, Pub. Safety § 2-512(c), (e); *see also* Pet. App. 80a (Barbera, J., dissenting). Federal law similarly prohibits, with limited exceptions not relevant here, the use of the information in the CODIS database for purposes other than identification, *see* 42 U.S.C. § 14132(b)(3), and provides that a state's access to CODIS "is subject to cancellation if the . . . privacy requirements" established by federal law are not satisfied, *id.* § 14132(c). Thus, any speculation that state officials might attempt to access the "vast genetic treasure map" inside a DNA sample taken from an arrestee is unfounded.

B. There Is No Scientific Evidence That Sensitive Genetic Information Can Be Gleaned From The DNA Analysis At Issue Here.

The Maryland Court of Appeals and respondent have also attempted to cast doubt on whether analysis of the 13 CODIS core loci truly reveals only information concerning one's identity. The Maryland Court of Appeals asserted that there is "considerable current debate as to whether these 'non-coding' or 'junk' DNA provide no predictive genetic information." Pet. App. 22a n.17. In his brief in opposition, respondent similarly asserted that, "[e]ven before the decision in this case, the scientific community had hotly debated the significance of 'non-coding loci,'" and that "scientists have [more recently] shown that 'non-coding loci'—colloquially known as 'junk DNA'—'turn out to play critical roles in controlling how cells, organs and other tissues behave.'" Br. in Opp. 15 (quoting Gina Kolata, *Bits of Mystery DNA, Far From 'Junk,' Play Crucial Role*, N.Y. Times, Sept. 6, 2012, at A1).

These highly generalized assertions regarding "non-coding" or "junk" DNA have no relevance here. As explained above, 95% of human DNA is noncoding. *See supra* p. 4. Although there may be, as a general matter, DNA sequences within noncoding regions that have a biological function, there is no scientific basis for concluding that the *13 CODIS core loci* used for standard forensic DNA analysis have any biological function or are associated with any particular traits, and thus might reveal any private information apart from one's identity.

To the contrary, a recent study confirmed that "there is no evidence that any particular repeat gen-

otypes are indicative of phenotype." Katsanis & Wagner, *supra*, at 3. In other words, there is no evidence that the number of repeats at an STR locus is indicative of an observable human trait. Thus, "[t]he utility of the CODIS profile itself . . . is limited to identification purposes at this time." *Id.* Professor Butler's recent textbook similarly explains that, "[w]hile there has occasionally been some debate in the literature regarding potential linkage of human identity testing markers to genetic disease states, this is really a non-issue." John M. Butler, *Advanced Topics in Forensic DNA Typing: Methodology* 226 (2012) (hereinafter Butler, *Advanced Topics*). The 13 CODIS core loci, Professor Butler explains, still "are not known to have any association with a genetic disease or any other genetic predisposition," and thus remain useful *only* "for human identity testing." *Id.* at 240.

The New York Times article on which respondent relied in his brief in opposition (Br. in Opp. 15) is not to the contrary. Indeed, that article says nothing about the particular loci used in forensic DNA analysis, and instead discusses only the biological functions of "junk" DNA as a general matter. *See* Kolata, *supra*, at A1. The underlying research discussed in that article—the project known as the Encyclopedia of DNA Elements, or ENCODE—also does not suggest that the 13 CODIS core loci are more revealing than previously thought. "The ENCODE research makes no reference to the potential importance of short tandem repeats within functional genome elements, which would implicate CODIS markers." Karen Kreeger, *Reconciling ENCODE and CODIS*, Penn Medicine News Blog (Sept. 18, 2012), http://news.pennmedicine.org/blog/2012/09/reconciling-encode-and-codis.html. Thus, "while

ENCODE . . . may have revealed that the genomic regions including the CODIS markers have some functionality, ENCODE has not demonstrated that CODIS genotypes have any known functionality or that the resulting CODIS profiles have any known direct positive or negative predictive value for inferring phenotypes [*i.e.*, human traits]." Jennifer K. Wagner, *ENCODE, CODIS, and the Urgent Need to Focus on What is Scientifically and Legally Relevant to the DNA Fingerprinting Debate*, Genomics Law Report (Sept. 21, 2012), http://www.genomicslawreport.com/index.php/2012/09/21/encode-codis-and-the-urgent-need-to-focus-on-what-is-scientifically-and-legally-relevant-to-the-dna-fingerprinting-debate/.

It is equally irrelevant that, as scientists have long recognized, there is some potential that the 13 CODIS core loci could be used to analyze the inheritance of medical conditions within a family. *See, e.g.*, Butler, *Advanced Topics*, *supra*, at 228 (citing C.P. Kimpton et al., *Report on the Second EDNAP Collaborative STR Exercise*, Forensic Sci. Int'l (1995)). This analysis is possible because, on a chromosome, an STR locus may be positioned near a gene that causes a particular medical condition, and a particular STR sequence and the gene may therefore tend to be passed together from parent to child. *See, e.g.*, Cal. Dep't of Justice, Office of the Attorney Gen., *BFS DNA Frequently Asked Questions, Searching the CAL-DNA Data Bank and CODIS*, http://oag.ca.gov/bfs/prop69/faqs. "However, this use of STRs for family linkage studies is different than associations of specific alleles in a general population." Butler, *Advanced Topics*, *supra*, at 228. That is, a person's forensic DNA profile, standing alone, cannot be used to predict whether that person has a

certain medical condition or other trait. And the CODIS database itself, which does not contain information linking family members, cannot be used for this sort of analysis. *See id.*; Scientific Working Group on DNA Analysis Methods, *SWGDAM Executive Board Considerations for Claims that the CODIS Core Loci are "Associated" with Medical Conditions / Diseases* 3-4 (Sept. 17, 2012), http://www.swgdam.org/SWGDAM_State_v_Abernathy.pdf.

Accordingly, there is no scientific evidence that information apart from identity can currently be gleaned from the 13 CODIS core loci. Katsanis & Wagner, *supra*, at 3. To be sure, scientific advances are difficult to predict, and it cannot be stated with absolute certainty that the 13 CODIS core loci are "forever immune from any implications for potentially sensitive or medically relevant information." *Id.* Even if such implications might someday be found, however, they likely would be short-lived. *See* Butler, *Advanced Topics*, *supra*, at 228 ("the relatively high mutation rate of STRs means that even if any linkage existed at one time between a specific allele and a genetic disease state, this linkage would likely not last beyond a few generations"). And, in any event, "Fourth Amendment cases must be decided on the facts of each case, not by extravagant generalizations." *Dow Chem. Co. v. United States*, 476 U.S. 227, 239 n.5 (1986). Thus, speculation that the 13 CODIS core loci *might*, at some unknown time in the future, be found to reveal sensitive genetic information cannot give rise to a Fourth Amendment violation in this case. *See, e.g.*, *Boroian*, 616 F.3d at 69 ("the possibility that junk DNA may not be junk DNA some day does not significantly augment [the]

privacy interest in the present case") (internal quotation marks and ellipsis omitted).

C. Any Purported Distinction Based On The Outward Nature Of Fingerprints Versus The Inward Nature Of DNA Is Immaterial.

Finally, the Maryland Court of Appeals observed that "fingerprints are a physical set of ridges on the skin of a person's fingers" and that a fingerprint sample is obtained when the fingers are "exposed to ink (or other medium) and the resultant imprint placed on paper or electronic records," whereas DNA "is contained within our cells and is collected by swabbing the interior of a cheek." Pet. App. 60a. This purported distinction also has no bearing on the validity of forensic DNA analysis under the Fourth Amendment.

As the Maryland Court of Appeals itself acknowledged, "the physical intrusion of a buccal swab is deemed minimal." Pet. App. 60a; *see also id.* at 77a (Barbera, J., dissenting) ("DNA collection in Maryland is achieved by rubbing and rotating a cotton swab on the inside of an individual's cheeks . . . for a few seconds"). Indeed, this Court has recognized that the "intrusion occasioned by a blood test is not significant, since such 'tests are a commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain.'" *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 625 (1989) (quoting *Schmerber v. California*, 384 U.S. 757, 771 (1966)). It follows that the intrusion occasioned by an even *less* invasive cheek swab is also not significant from the perspective of the

Fourth Amendment. *See* Pet. App. 78a (Barbera, J., dissenting) ("If the subcutaneous removal of blood from a person's veins presents only a marginal intrusion into that person's privacy interest, *a fortiori* the insertion of a cotton swab into a person's mouth is less of an intrusion and fairly characterized as *de minimis*.").

Because the physical intrusion necessary to obtain a DNA sample is not meaningfully greater than the physical intrusion necessary to obtain a fingerprint sample, it makes no difference under the Fourth Amendment that the samples are obtained in distinct ways—or that DNA is contained "within our cells," as opposed to appearing as "a physical set of ridges on the skin." Pet. App. 60a. Rather, the relevant question is whether forensic DNA analysis reveals the same type of *information* as forensic fingerprint analysis. For the reasons explained above, it does. Thus, like fingerprint analysis, forensic DNA analysis conducted pursuant to a valid arrest serves the government's essential interest in identifying suspected perpetrators of crimes without meaningfully intruding upon individual privacy. And, like fingerprint analysis, this powerful—and minimally invasive—investigative tool is fully consistent with the Fourth Amendment.

CONCLUSION

This Court should reverse the judgment of the Maryland Court of Appeals.

Respectfully submitted.

JOHN W. WOLFE
DLA PIPER LLP
701 Fifth Avenue
Suite 7000
Seattle, WA 98104
(206) 839-4800

THEODORE B. OLSON
Counsel of Record
AMIR C. TAYRANI
ERIK R. ZIMMERMAN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tolson@gibsondunn.com

Counsel for Amicus Curiae

January 2, 2013

AMICUS CURIAE BRIEF

No. 12-207

IN THE

Supreme Court of the United States

STATE OF MARYLAND,

Petitioner,

v.

ALONZO JAY KING, JR.,

Respondent

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF FOR THE HOWARD UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS CLINIC AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

ADERSON B. FRANÇOIS
Counsel of Record
HOWARD UNIVERSITY
SCHOOL OF LAW
CIVIL RIGHTS CLINIC
2900 Van Ness Street NW
Washington, DC
(202) 806-8065
Afrancois@law.howard.edu

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	iv
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE COURT HAS LONG REFUSED TO PERMIT THE GOVERNMENT TO TURN A LEGITIMATE INTEREST IN IDENTIFYING SUSPECTS INTO AN UNCONSTITUTIONAL END-RUN AROUND THE FOURTH AMENDMENT'S PROHIBITION AGAINST UNREASONABLE SEARCHES AND SEIZURES.	4
A. The Fourth Amendment Limits Police Requests for Identification to only information necessary to ascertain a person's identity	5
B. In the Absence of Reasonable Suspicion, the Fourth Amendment Does Not Permit the Police to use a Request for Identification as a Pretext to Open a Person's Life to Investigation	7
C. Even under the Special Needs Exception of Administrative Security for Pre-trial Detainees, Probationers, and Parolees, the Fourth Amendment does not Permit Law Enforcement to use Requests for Identification as a Primary Tool of Investigation	8

TABLE OF CONTENTS—Continued

Page

II. THE MARYLAND DNA COLLECTION STATUTE VIOLATES THE FOURTH AMENDMENT BECAUSE ITS PRIMARY PURPOSE IS INVESTIGATORY RATHER THAN FOR IDENTIFICATION, ADMINISTRATIVE SECURITY OR OTHER SPECIAL NEED 12

A. The Primary Goal of the Maryland DNA Collection Statute is to Investigate Crime 13

B. Because the DNA Evidence Seized Under the Maryland DNA Collection Act is Merely for Investigatory Purposes, it Does not Further the Government's Interest in Identifying Arrestees 15

III. IDENTIFICATION POLICIES THAT APPEAR FACIALLY NEUTRAL HAVE BEEN USED DISPROPORTIONALLY AS INVESTIGATORY TOOLS AGAINST MINORITY POPULATIONS .. 18

A. Stop and Frisk Law Enforcement Policies have Resulted in Police Practices that Specifically Target Minorities 18

B. African American and Latino Drivers Continue to Have Their Vehicles Searched at a Higher Rate During Traffic Stops 24

TABLE OF CONTENTS—Continued

Page

C. African Americans are Predominately Arrested for Drug Use While all Evidence Suggests Individuals of Other Races Partake in Equal Amounts of Illegal Narcotics use 26

CONCLUSION 29

TABLE OF CITED AUTHORITIES

CASES	Page(s)
Adams v. Williams, 407 U.S. 143 (1972)	4
Bell v. Wolfish, 441 U.S. 520 (1979)	9
Chandler v. Miller, 520 U.S. 305 (1997)	4, 7
City of Indianapolis v. Edmond, 531 U.S. 32 (2000)	8, 10, 11
Clark v. Tinnin, 731 F. Supp. 998 (D. Colo. 1990)	8
Davis v. Mississippi, 394 U.S. 721 (1969)	5, 6, 15
Ferguson v. City of Charleston, 532 U.S. 67 (2001)	10, 11
Florida v. J.L., 529 U.S. 266 (2000)	7
Floyd v. City of New York, 813 F. Supp. 2d 417 (S.D.N.Y. 2011)	22
Friedman v. Boucher, 580 F. 3d 847 (9th Cir. 2009)	9
Griffin v. Wisconsin, 483 U.S. 868 (1987)	8, 10
Haskell v. Brown, 677 F. Supp. 2d 1187 (N.D. Cal. 2009)	14
Haskell v. Harris, 669 F.3d 1049 (9th Cir. 2012)	6
Hayes v. Florida, 470 U.S. 811 (1985)	4, 15, 16
Hiibel v. Sixth Judicial District of Nevada, 542 U.S. 177 (2004)	4, 5, 6, 7
I.N.S., v. Lopez-Mendoza, 468 U.S. 1032 (1984)	16

TABLE OF CITED AUTHORITIES

Page(s)

King v. Maryland, 42 A.3d 549 (Md. Ct. App. 2012) 12, 14

Magill v. Lee County, 990 F. Supp. 1382 (M.D. Ala. 1998) 8

Newkirk v. Sheers, 834 F. Supp. 772 (E.D. Pa. 1993) 9

People v. Buza, 129 Cal. Rptr. 3d 753 (Cal. Ct. App. 2011) *reh'g granted People v. Buza*, 262 P.3d 854 (Cal. 2011) 6, 9, 29

Samson v. California, 547 U.S. 843 (2006) . 4, 9

Skinner v. Railway Labor Exec. Ass'n, 489 U.S. 602 (1989) 10

Terry v. Ohio, 392 U.S. 1 (1968)..18, 19, 20, 23, 24

United States v. Cortez, 449 U.S. 411 (1981) 7

United States v. Garcia-Beltran, 389 F.3d 864 (9th Cir. 2004) 17

United States v. Guevara-Martinez, 262 F.3d 751 (8th Cir. 2001) 17

United States v. Guzman-Bruno, 27 F.3d 420 (9th Cir. 1994) 16, 17

United States v. Knights, 534 U.S. 112 (2001) 4, 9

United States v. Mitchell, 652 F.3d 387 (3d Cir. 2011) 9-10

United States v. Roque-Villanueva, 175 F.3d 345 (5th Cir. 1999) 16

TABLE OF CITED AUTHORITIES

Page(s)

Veronina School District 47J v. Acton, 515 U.S. 646 (1995) 10

CONSTITUTION

U.S. Const. amend. IV ..... *passim*

STATUTES

Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. §1320d *et seq*. (2012) 2

Md. Code Ann., Collection of DNA Samples, § 2-504(3) (West 2012) 1, 2, 15, 18

Md. Code Ann., Confidentiality of Medical Records §4-302 (West 2008) 2

Md. Code Ann., Purposes of Testing DNA Samples § 2-505(a) (West 2012) 12

Patient Protection and Affordable Care Act, 42 U.S.C. §1320a-7k(b)(2) (2012) 2

OTHER AUTHORITIES

Al Baker, *City Minorities More Likely To Be Frisked*, N.Y. Times, May 13, 2010, at A1 22

Andrew Gelman, Jeffrey Fagan & Alex Kiss, *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. Am. Stat. Ass'n 813 (2007) 21

TABLE OF CITED AUTHORITIES

Page(s)

Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. Rev. 956, 987-88 (1999) 24

Ben Poston, *Disparities are Greater than other Large Metro Police Departments, Journal Sentinel*, Dec. 3, 2011, http://www.jsonline.com/watchdog/watchdogreports/racial-gap-found-in-traffic-stops-in-milwaukee-ke1hsip-134977408.html 25, 26

Building Trust: Confidentiality and the Ryan White HIV/AIDS Program, HRSA.gov, http://hab.hrsa.gov/livinghistory/issues/confidentiality_1.htm (last visited January 20, 2013) 2

Ctr. for Constitutional Rights, *Stop and Frisk-The Human Impact*, (July 2012) http://stopandfrisk.org/the-human-impact-report.pdf 19, 20

Corey Preston, Note, *Faulty Foundations: How the False Analogy to Routine Fingerprinting Undermines the Argument for Arrestee DNA Sampling*, 19 Wm. & Mary Bill Rts. J. 475 (2010) 6

Craig Menchin, *Why NYPD Terry Stops Are More Problematic Than You Think*, 8 Stan. J. Civ. Rts. & Civ. Liberties 299 (2012) 23

TABLE OF CITED AUTHORITIES

Page(s)

Darius Charney, Jesus Gonzalez, David Kennedy, Noel Leader, Robert Perry, *Suspect Fits Description: Responses to Racial Profiling in New York City*, 14 CUNY L. Rev. 57 (2010) 20, 22

Fact Sheet, FBI, http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis_facts (last updated Oct. 16, 2012)..... 14

Frequently Asked Questions on the CODIS Program and National System Database, FBI, http://www.fbi.gov/about-us/lab/codis/codis-and-ndis-fact-sheet (last updated July 14, 2011)..... 13

Genetic Discrimination, Nat'l Human Genome Research Inst., http://www.genome.gov/10002077 (last visited January 20, 2013)..... 2

George Lipsitz, *"In an Avalanche Every Snowflake Pleads Not Guilty:" The Collateral Consequences of Mass Incarceration and Impediments to Women's Fair Housing Rights*, 59 UCLA L. Rev. 1746 (2012)..... 20

Greg Ridgeway, *Analysis of Racial Disparities in the New York Police Department's Stop, Question, and Frisk Practices*, http://www.rand.org/pubs/technical_reports/TR534.html..... 20

TABLE OF CITED AUTHORITIES

Page(s)

Governor Martin O'Malley, State of the State Address (Jan. 23, 2008) http://www.governor.maryland.gov/speeches/080123 13

James Warren, *Driving While Black*, The Atlantic, (July 2009), http://www.theatlantic.com/magazine/archive/2009/07/driving-while-black/307625/ 19

Janice Nadler and J.D. Trout, *The Language of Consent in Police Encounters, in Oxford Handbook on Linguistics and Law* (Peter Tiersma ed., 2012) 24

Joseph Goldstein, *Police Stop-and-Frisk Program in Bronx is Ruled Unconstitutional*, N.Y. Times, (Jan. 8, 2013), http://www.nytimes.com/2013/01/09/nyregion/judge-limits-nypd-stop-and-frisk program-in-bronx.html 19

Kathleen R. Sandy, *The Discrimination Inherent In America's Drug War: Hidden Racism Realized By Examining the Hysteria Over Crack*, 54 Ala. L. Rev. 665 (2003) 28

Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the War on Drugs Was a War on Blacks*, 6 J. Gender Race & Just. 381 (2002) 26, 27, 28

Kevin Lapp & Joy Radice, *A Better Balancing: Reconsidering Pre-Conviction DNA Extraction from Federal Arrestees*, 90 N.C. L. Rev. Addendum 157 (2012) 29

TABLE OF CITED AUTHORITIES

Page(s)

Md. S. Amend., 2008 Sess. S.B. 211 13

Michael Powell, *For New York Police, There's No End to the Stops*, N.Y. Times, (May 14, 2012) http://www.nytimes.com/2012/05/15/nyregion/for-new-york-police-theres-no-end-to-the-stops.html 21

Michael R. Smith & Geoffrey P. Alpert, *Explaining Police Bias: A Theory of Social Conditioning and Illusory Correlation* (10th ed. 2007) 23

Michael Tonry, *Malign Neglect-Race, Crime, and Punishment in America* 117 (1995) .. 27

Michelle Alexander, *The New Jim Crow*, 9 Ohio St. J. Crim. L. 7 (2011)..... 27

Monique Garcia & Ray Long, *Study Sees Racial Bias in Traffic-Stop Searches*, Chicago Trib., July 24, 2008, http://articles.chicagotribune.com/2008-07-25/news/0807250350_1_consent-searches-white-drivers-hispanics 25, 26

New York Civil Liberties Union, Stop and Frisk 2011 (May 9, 2011), http://www.nyclu.org/files/publications/NYCLU_2011_stop-and-frisk_report.pdf..... 20

Robert A. Hull, Note, *"What Hath Hiibel Wrought?": The Constitutionality of Compelled Self Identification*, 33 Pepp. L. Rev. 185 (2005)..... 6

TABLE OF CITED AUTHORITIES

Page(s)

Ryan S. King, *Disparity by Geography: The War on Drugs in America's Cities*, The Sentencing Project (May 2008) www.sentencingproject.org/doc/publications/dp_drugarrestreport.pdf 27-28

Steven D. Levitt & S idhir Alladi Venkatesh, *An Economic Analysis of a Drug-Selling Gang's Finances*, 115 Q.J. Econ. 755 (2000) 19

Stop, Question and Frisk in New York Neighborhoods, N.Y. Times (July 11, 2010), http://www.nytimes.com/interactive/2010/07/11/nyregion/20100711-stop-and-frisk.html?ref=nyregion 22-23

Wayne A. Logan, *Policing Identity*, 92 B.U. L. Rev. 1561 (2012) 21

INTEREST OF *AMICUS CURIAE*

Amicus curiae are faculty in the Howard University School of Law and attorneys in the Civil Rights Clinic.[1] As part of the Law School's educational mission, the Civil Rights Clinic at the Howard University School of Law engages in trial and appellate impact litigation in the service of human rights, social justice, economic fairness and political equality. The Clinic provides *pro bono* services to indigent prisoners, and *pro se* clients in federal and state courts on a range of civil rights matters, including but not limited to employment and housing discrimination, voting rights, police brutality, unconstitutional prison conditions, habeas corpus, and unfair procedural barriers to the courts.

Before the Court is the question of whether under the Collection of DNA Samples provision of the Maryland Code[2] the collection and analysis of DNA from an individual who has been arrested but not convicted of a crime offends the Fourth Amendment. This type of DNA farming for use in the investigation of both past and future crimes goes beyond basic identification of a suspect, is deeply invasive, violates the protections of the Fourth Amendment, and ignores the reasonable suspicion requirements set forth by this Court's jurisprudence. Because

---

[1] Pursuant to Supreme Court Rule 37, this brief is filed with the written consent of all parties. The parties' consent letters are on file with the Court. This brief has not been authored, either in whole or in part, by counsel for any party, and no person or entity, other than *amicus curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief.

[2] Md. Code Ann., Collection of DNA Samples, § 2-504(3) (West 2012).

indiscriminately collecting and analyzing DNA materials from a person from the moment police believe that person may have committed a crime poses a grave threat to the constitutional privacy rights of all Americans, *amicus curiae* respectfully submits this brief in support of Respondent Alonzo Jay King, Jr. to urge the Court to uphold the decision of the Maryland Court of Appeals, finding the DNA collection provision of the Maryland Code unconstitutional.

SUMMARY OF ARGUMENT

Identification of suspects for law enforcement purposes is a legitimate government interest. However, DNA farming and warehousing of the sort contemplated by the Maryland Statute is not a legitimate means of identifying individuals who have been merely arrested but nether tried nor convicted of any crime. Unlike other established forms of identification such as fingerprints, DNA analysis is a wide open door into a person's life: it can reveal such private and sensitive matters as a person's entire family tree, physical and mental health, and any number of genetic information protected by federal law.[3] Considering the immense weight of personal

---

[3] *See generally* Health Insurance Portability and Accountability of Act of 1996, 42 U.S.C. §1320d *et seq.* (2012); Patient Protection and Affordable Care Act, 42 U.S.C. §1320a-7k(b)(2) (2012); Md. Code Ann., Confidentiality of Medical Records §4-302 (West 2008); *Genetic Discrimination*, Nat'l Human Genome Research Inst., http://www.genome.gov/10002077 (last visited January 20, 2013)("Genetic Information Non-Discrimination Act of 2008: GINA protects Americans from discrimination based on their genetic information in both health insurance (Title I) and employment (Title II)."); *Building Trust: Confidentiality and the Ryan White HIV/AIDS Program*, HRSA.gov, http://hab.hrsa.

information that DNA carries, allowing law enforcement to seize a person's DNA for no other reason than that they are under arrest, is to give law enforcement uncontrolled and unprecedented access to a person's health information, family history, and virtually their entire life. The type of DNA collection considered by the Maryland statute is nothing more than an end-run around the Fourth Amendment.

This Court has never permitted law enforcement to use investigative police work as a basis for ignoring the Fourth Amendment. In fact, the Fourth Amendment has only permitted suspicionless searches in special classified instances, none of which are applicable in the case before the Court. *See infra* parts I.B-I.C.

Even if, like fingerprints, it is assumed that DNA could be used in a limited fashion merely to ascertain the identity of a suspect and nothing more, the Maryland statute would still run afoul of the Fourth Amendment. Courts have rightly refused to permit the police to use fingerprints as a means to investigate whether or not an individual committed a crime when they were allegedly obtained for identification purposes. *See infra* part II.B. The comparison to fingerprints also demonstrates that DNA farming and warehousing has grave implications for investigatory misuse, because the analysis and collection of DNA arrestees has the potential to create a class of Americans who are permanently tracked by law enforcement. Stop and Frisk policies, racial profiling during vehicular stops, and the War on Drugs all serve as examples of policies whereby law

---

gov/livinghistory/issues/confidentiality_1.htm (last visited January 20, 2013).

enforcement sought to diminish crime but then quickly turned them against African Americans, Latinos, and other non-privileged groups *See infra* parts III.A-III.C. For these reasons and those set forth below, *amicus curiae* submits that, as currently drafted, the Maryland DNA collection statute cannot constitutionally coexist with the Fourth Amendment.

ARGUMENT

I. THE COURT HAS LONG REFUSED TO PERMIT THE GOVERNMENT TO TURN A LEGITIMATE INTEREST IN IDENTIFYING SUSPECTS INTO AN UNCONSTITUTIONAL END-RUN AROUND THE FOURTH AMENDMENT'S PROHIBITION AGAINST UNREASONABLE SEARCHES AND SEIZURES

This Court has long articulated a need for officers to obtain certain identification information from suspects or persons suspected to be engaged in, or about to engage in, criminal behavior. *See Hiibel v. Sixth Judicial District of Nevada*, 542 U.S. 177, 186 (2004); *Hayes v. Florida*, 470 U.S. 811, 816 (1985); *Adams v. Williams*, 407 U.S. 143, 146 (1972). At the same time, the court has limited such quests for identification to the mere requirement to provide a name or identification document and has refused to turn the mere request for identification information into an unrestricted police investigatory tool. *See Hiibel*, 542 U.S. at 185. To be sure, the Court has allowed suspicionless searches in special circumstances—for instance, in the interest of jailhouse security or amongst probationers and parolees. *See Samson v. California,* 547 U.S. 843, 848 (2006); *United States v. Knights*, 534 U.S. 112, 122 (2001). However, even when dealing with special needs searches, the Court has been clear that such searches are unconstitutional when conducted for a

solely investigatory purpose. *See Chandler v. Miller*, 520 U.S. 305, 308 (1997).

A. The Fourth Amendment Limits Police Requests for Identification to only information necessary to ascertain a person's identity

Taken alone, the act of requiring a suspect to identify him or herself does not violate the Fourth Amendment. *Hiibel,* 542 U.S. at 185 ("In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment."). Thus, when the police have a reasonable suspicion for stopping and questioning an individual, the Court has consistently permitted law enforcement to ascertain a suspect's identity through questions or by asking to review a suspect's identification documents. *Id.* at 186. As a practical matter, this means that a suspect who is legally seized for Fourth Amendment purposes must provide the police with some form of identifying documentation, such as a driver's license or passport, or to verbally identify themselves to law enforcement. *See Hiibel,* 542 U.S. at 185 (noting that an officer's reasonable suspicion "permits the officer to stop the person for a brief time and take additional steps to investigate further").

However, the general law enforcement interest in identifying suspects is subject to two crucial limitations. First, even when the police may have a reasonable suspicion to stop and question an individual, this Court has also held that gathering identifying information of an unidentified suspect may only be used to determine who the person is, and may not be used as a pretext to open the person's life to investigation. *See Davis v. Mississippi*, 394 U.S.

721, 726 (1969) ("[T]o argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention."); *see also People v. Buza*, 129 Cal. Rptr. 3d 753, 783 (Cal. Ct. App. 2011) (finding the requirement of felony arrestees to submit a DNA sample for investigatory purposes analysis and inclusion in state and Federal DNA databases invalid under the Fourth Amendment); Corey Preston, Note, *Faulty Foundations: How the False Analogy to Routine Fingerprinting Undermines the Argument for Arrestee DNA Sampling*, 19 Wm. & Mary Bill Rts. J. 475, 508 (2010) ("This intuition in Davis towards suppressing evidence that is gained from a broad criminal investigative purpose or searches lacking individualized suspicion, has been consistently reaffirmed by the Court.").

Second, law enforcement interest in suspect identification does not extend so far as to permit police to compel a person to stop and identify himself absent reasonable suspicion that is based upon objective facts that the person was engaged in, or is about to engage in a crime. *See* Robert A. Hull, Note, *"What Hath Hiibel Wrought?": The Constitutionality of Compelled Self Identification*, 33 Pepp. L. Rev. 185, 223-25 (2005) (discussing the implications of the Court's decision in *Hiibel*). Without reasonable suspicion, the individual's privacy interests tip the balance such that the conduct of law enforcement in collecting certain identification information can constitute a Fourth Amendment violation. *Compare Haskell v. Harris*, 669 F.3d 1049, 1066 (9th Cir. 2012)

(Fletcher, J., dissenting) (stating taking DNA samples from arrestees solely absent reasonable suspicion or a warrant violates the Fourth Amendment) *with Hiibel*, 542 U.S. at 189 (upholding conviction under stop and identify statutes where the officer's request for an individual to identify himself was "reasonably related in scope to the circumstances which justified the stop.").

B. In the Absence of Reasonable Suspicion, the Fourth Amendment Does Not Permit the Police to use a Request for Identification as a Pretext to Open a Person's Life to Investigation

The Fourth Amendment to the United States Constitution states that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. "This restraint on government conduct generally bars officials from undertaking a search or seizure absent individualized suspicion." *Chandler v. Miller*, 520 U.S. 305, 308 (1997) (citations omitted) (internal quotation marks omitted). As such, the Court has made it clear that the government does not possess unfettered discretion in conducting suspicionless searches for the purpose of uncovering evidence of a crime. *United States v. Cortez*, 449 U.S. 411, 417 (1981) ("An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be engaged in criminal activity."). Rather, at minimum, government actors must possess articulable individualized suspicion in order to pursue their crime control ends within the constraints of the Constitution. *Florida v. J.L.*, 529 U.S. 266, 268

(2000) (searches conducted without individualized reasonable suspicion are unconstitutional).

To be sure, the Court has carved out narrow exceptions to the prohibition of using suspect identification as an investigatory tool, namely to ensure jailhouse security amongst pre-trial detainees while in custody, and amongst probationers and parolees. *See Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987). However, even when authorizing these certain special needs searches, the Court has been careful not to allow them to be used to conduct suspicionless searches for an investigatory purpose. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (discussing the limited circumstances under the special needs exception that permit search and seizure absent individualized suspicion).

C. Even under the Special Needs Exception of Administrative Security for Pre-trial Detainees, Probationers, and Parolees, the Fourth Amendment does not Permit Law Enforcement to use Requests for Identification as a Primary Tool of Investigation

The government may take measures that are reasonably calculated to effectuate pretrial detention. However, pre-trial detainees do not forfeit all constitutional rights just because they are in custody, *Magill v. Lee County*, 990 F. Supp. 1382, 1387 (M.D. Ala. 1998), and they continue to maintain a right of privacy and a degree of freedom, although limited, from unreasonable searches under the Fourth Amendment. *See Clark v. Tinnin*, 731 F. Supp. 998, 1004-05 (D. Colo. 1990).

The authority to conduct a suspicionless search of a pre-trial detainee is based upon the legitimate government interest in managing the facility in which the individual is detained. Another basis for the authority of prison officials over pretrial detainees comes from the responsibility of prison officials to ensure the appearance of detainees at trial. *Newkirk v. Sheers*, 834 F. Supp. 772, 781 (E.D. Pa. 1993). To reach these ends, the government is allowed to ensure no weapons or illicit drugs are within a detention center, and to maintain its overall security. However, the Supreme Court has never "ruled that law enforcement officers may conduct suspicionless searches on pretrial detainees for reasons other than prison security." *Friedman v. Boucher*, 580 F.3d 847, 856-57 (9th Cir. 2009) (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)).

Correspondingly, it is important to distinguish a diminished expectation of privacy based on administrative security versus one that is based upon guilt. The Court has found that a probationer or parolee's expectation of privacy is substantially diminished as compared to pre-trial detainees. Unlike pre-trial detainees, parolees and probationers are still under prison control upon their release; and this presumption of control based upon the guilt of conviction, tips the Fourth Amendment balance to government discretion in allowing suspicionless searches of probationers and parolees. *Samson v. California*, 547 U.S. 843, 848 (2006); *United States v. Knights*, 534 U.S. 112, 122 (2001); *see also Buza*, 129 Cal. Rptr. 3d at 767. For parolees and probationers, searches by law enforcement are not unreasonable because they are already convicted of a crime and the government interest in identifying these classes of offenders is compelling. "[I]n comparison to the

probationer cases, the interests in supervision and prevention of recidivism are much diminished, if not absent, in the context of arrestees and pretrial detainees." *United States v. Mitchell*, 652 F.3d 387, 415 n. 25 (3d Cir. 2011). Unlike mere arrestees, searches of parolees, who have a diminished expectation of privacy based on guilt, are not unreasonable and do not violate the Fourth Amendment. In sum, where suspicionless searches have been allowed, it has been limited to jailhouse security and persons who have already been convicted.

Even in the course of certain specified special needs searches, which may be conducted without particularized reasonable suspicion, the Court has limited such searches when the primary purpose has been found to be investigatory. The Court has recognized an exception to the Fourth Amendment's prohibition of suspicionless searches when "special needs beyond the normal need for law enforcement make the warrant and probable-cause requirements impracticable." *Griffin v. Wisconsin*, 483 U.S. 868, 872 (1987); *see generally Veronina School District 47J v. Acton*, 515 U.S. 646 (1995) (random drug testing of student-athletes aimed at deterring drug use); *Skinner v. Railway Labor Execs. Ass'n.*, 489 U.S. 602 (1989) (drug and alcohol tests for railway employees for the purpose of workplace safety).

However, this exception does not apply when "the immediate objective of the [search is] to generate evidence for law enforcement purposes," even if the "ultimate go is to advance an interest not related to crime control. *Ferguson v. City of Charleston*, 532 U.S. 67, 82-84 (2001). Instead, individualized suspicion is required "where governmental authorities primarily pursue their general crime control ends."

City of Indianapolis v. Edmond, 531 U.S. 32, 43 (2000).

In declining to recognize an investigatory purpose as sufficient to dispense with the Fourth Amendment's requirement of individualized suspicion, the Court has noted that allowing such searches would circumvent the very protections afforded by the Fourth Amendment. *See id.* at 42. For example, in *City of Indianapolis v. Edmond*, the Court invalidated a city's highway narcotics checkpoint program because its primary purpose was to uncover evidence of ordinary criminal wrongdoing. *Id.* at 41-42. The Court reasoned "without drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life." *Id.* at 42.

Similarly, in *Ferguson v. City of Charleston*, the Court invalidated a hospital policy of performing drug tests on pregnant patients suspected of using cocaine and forwarding positive results to law enforcement for prosecution. 532 U.S. 67, 70-73 (2001). The Court found that "[w]hile the ultimate goal of the program was to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence for law enforcement purposes in order to reach that goal." *Id.* at 82-83. A "benign" motive, according to the Court, could not justify a departure from Fourth Amendment protections. *Id.* at 85-86. Rather, the mere fact that the hospital used the test for an investigatory purpose "provides[s] an affirmative reason for enforcing the strictures of the Fourth Amendment." *Id.* at 84.

The Court's special needs jurisprudence illustrates that suspicionless searches are never permissible for the purpose of uncovering evidence of a crime. Rather, in such circumstances, a valid search warrant is required. Therefore, the suspicionless search conducted when the government requires the DNA of an arrestee be taken upon booking cannot be justified by the government's interest in solving past and future crimes.

II. THE MARYLAND DNA COLLECTION STATUTE VIOLATES THE FOURTH AMENDMENT BECAUSE ITS PRIMARY PURPOSE IS INVESTIGATORY RATHER THAN FOR IDENTIFICATION, ADMINISTRATIVE NEEDS, JAILHOUSE SECURITY OR OTHER SPECIAL NEED

The Maryland DNA statute pursues a general interest in crime control and investigation, a purpose that is incompatible with the Fourth Amendment. The Maryland DNA collection statute enumerates five purposes for the collection of DNA from those that come in contact with the criminal justice system: "(1) to analyze and type the genetic markers contained in or derived from the DNA samples; (2) as part of an official investigation into a crime; (3) to help identify human remains; (4) to help identify missing individuals; and (5) for research and administrative purposes." Md. Code Ann., Purposes of Testing DNA Samples § 2-505(a) (West 2012). Importantly, the statute does not indicate identification of an individual as one of the purposes. Nor was the purpose of the statute amended to include an interest in identification when its scope was expanded to include arrestees in 2008. Disregarding the statute's stated purpose to investigate criminal suspects, the State of Maryland

argued in *King* that the DNA collected under the statute was meant to identify arrestees. *King v. Maryland*, 42 A.3d 549, 578-600 (Md. Ct. App. 2012).

A. The Primary Goal of the Maryland DNA Collection Statute is to Investigate Crime

From its inception, the DNA collection statute has had the explicit goal of battling crime. In his 2008 annual State of the State address, Maryland Governor Martin O'Malley stated that he intended to promote certain initiatives to battle crime in Maryland. Governor Martin O'Malley, State of the State Address (Jan. 23, 2008). http://www.governor.maryland.gov/speeches/080123. One such initiative would involve the collection of DNA from persons arrested of violent crimes. *Id.* Further, while the committee amendment provided that an arrestee's DNA could be taken upon arrest, his or her DNA would not be tested until after arraignment. Md. S. Amend. 2008 Sess. S.B. 211. These provisions, which were ultimately incorporated into the statute, further establish that the express purpose of the statute is not to identify criminal suspects but to pursue a general goal of investigating past and future crimes.

The State's claim that DNA collection is used merely for identification is further undercut by the procedure put in place to test an arrestee's DNA sample. Unless the arrestee requests or consents otherwise, the results are not immediate and would not aid law enforcement in identifying the individual until the DNA is thoroughly processed. DNA must first be analyzed, then a DNA profile is created and that profile is run through a DNA database. *Frequently Asked Questions on the CODIS Program and National System Database*, FBI, http://www.

fbi.gov/about-us/lab/codis/codis-and-ndis-fact-sheet (last updated July 14, 2011). Once an individual's DNA is entered into a DNA database the profile is not identified by name or case information, instead, it is only after a DNA match occurs that law enforcement is able to discern the identity of the individual. *Haskell v. Brown*, 677 F. Supp. 2d 1187, 1190-91 (N.D. Cal. 2009). A California district court noted that "the average processing time for arrestee [DNA] samples is currently about 31 calendar days." *Haskell*, 677 F. Supp. 2d at 1201 (internal quotation marks omitted). In the case of Alonzo King, his DNA was uploaded on July 13, 2009 and there was a "hit" on his DNA on August 4, 2009, a processing time of about three weeks. *King*, 42 A.3d at 553. Notably, this is shorter than the average processing time in California but it is still significantly longer than the time it takes to identify an arrestee via fingerprints, which can yield a response in four minutes for electronic criminal fingerprints. *See Fact Sheet*, FBI, http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis_facts (last updated Oct. 16, 2012).

For these reasons, the Maryland DNA Collection Statute does not in practice serve to identify arrestees in connection with the crime that they are currently charged. Assuming a suspect who is apparently unidentifiable to this point, consents to or requests the testing, the processing time for DNA does not allow for a quick turn around in a way that could realistically aid law enforcement in identification. Therefore, an objective analysis proves that the statute in fact serves a suspicionless investigative purpose and therefore violates the Fourth Amendment to the Constitution.

B. Because the DNA Evidence Seized Under the Maryland DNA Collection Act is Merely for Investigatory Purposes, it Does not Further the Government's Interest in Identifying Arrestees

The Maryland DNA Collection Act authorizes the seizure of DNA samples, in a way that does not further the government's interest in accurately identifying arrestees. The DNA samples taken are for investigation purposes, and the government's interest in investigation is not strong enough to overcome the high level of privacy interests that arrestees have in preserving the confidentiality of their DNA.

This Court and the Circuit Courts of Appeals have addressed the admissibility of fingerprint evidence on many occasions. Through those cases the courts have demonstrated that identity, when discovered through fingerprinting, is always admissible while fingerprints taken for an investigatory purpose must be supported by probable cause.

Fingerprint evidence taken for an investigatory purpose without probable cause must always be suppressed. *Hayes v. Florida*, 470 U.S. 811, 816 (1985); *Davis v. Mississippi*, 394 U.S. 721, 722 (1969). In *Hayes* and *Davis*, police fingerprinted individuals suspected of committing crimes in order to determine whether they were connected to those crimes. *See generally Hayes v. Florida*, 470 U.S. 811 (1985); *Davis v. Mississippi*, 394 U.S. 721 (1969). In both cases, the fingerprints were excluded because the arrests that led to the fingerprints were not supported by probable cause. The Court stated that individuals have an interest in their own privacy and

that legally, the "line is crossed when the police, without probable cause or a warrant, forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes." *Hayes,* 470 U.S. at 816.

It is an entirely different matter when the information is procured for identification purposes because an individual's identity is admissible regardless of how it was obtained. In *Lopez-Mendoza*, Adan Lopez-Mendoza disputed a court's jurisdiction over him after he was illegally arrested and discovered to be illegally present in the United States. *I.N.S., v. Lopez-Mendoza*, 468 U.S. 1032, 1040 (1984). Even though the arrest leading to the discovery was illegal, the Court said the "body or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest." *Id.* at 1039.

Subsequent courts have interpreted and applied this statement. The Fifth Circuit in *United States v. Roque-Villanueva* held that the Immigration and Naturalization record of an undocumented resident was not suppressible even though his identity was learned as a result of an illegal stop. *United States v. Roque-Villanueva*, 175 F.3d 345, 346 (5th Cir. 1999).

In *United States v. Guzman-Bruno*, the suspect moved to suppress his identity and criminal record as products of an illegal arrest. The court of appeals held "the district court did not err when it held that neither Guzman-Bruno's identity nor the records of his previous convictions and deportations could be suppressed as a result of the illegal arrest." *United States v. Guzman-Bruno*, 27 F.3d 420, 422 (9th Cir. 1994). The Ninth Circuit later narrowed its ruling in

Guzman-Bruno, "Guzman-Bruno, however, did not involve fingerprint evidence and the need to classify it as either investigatory or identification evidence (and thus Hayes and Davis were not implicated)." *United States v. Garcia-Beltran*, 389 F.3d 864, 867 n.4 (9th Cir. 2004).

The Ninth Circuit stayed in line with existing law by stating that the "simple fact of who a defendant is cannot be excluded, regardless of the nature of the violation leading to his identity." *Id.* at 868. But the Ninth Circuit ultimately remanded the case for a determination of the intent behind the fingerprinting. "Thus, on remand, if the evidence were to show that as a consequence of the illegal arrest of Garcia–Beltran, law enforcement officials obtained his fingerprints to pursue a criminal immigration law violation, the fingerprints would be subject to suppression unless they were obtained by 'means sufficient to have purged the taint of the initial illegality.'" *Garcia-Beltran*, 389 F.3d at 868 (citing *United States v. Guevara-Martinez*, 262 F.3d 751, 755 (8th Cir. 2001)). The Ninth Circuit recognized the special difficulty with fingerprint evidence in that it can be used to identify as well as investigate.

This overlap between investigation and identification was also an issue in *Guevara-Martinez*, where the Eighth Circuit questioned the intent behind a fingerprinting of a suspected illegal immigrant. *United States v. Guevara-Martinez*, 262 F.3d 751 755 (8th Cir. 2001). It is of special significance that, the suspect was not fingerprinted upon his arrest, but had his fingerprints taken later after being interviewed by an INS detective. *Id.* at 756. Both *Garcia-Beltran*, and *Guevara-Martinez* acknowledge the occasional difficulty in determining whether

prints are taken for an investigatory purpose, but both also make clear what should be done with the prints once the purpose behind taking them is determined: if they were taken to identify a suspect, they are admissible into evidence; if they were taken to without probable cause to investigate, they are not.

Similarly, here because the stated purpose of the Maryland DNA Collection Act is to use DNA evidence to investigate criminality, the collection and analysis of this DNA evidence cannot be reconciled with the Fourth Amendment.

III. IDENTIFICATION POLICIES THAT APPEAR FACIALLY NEUTRAL HAVE BEEN USED DISPROPORTIONALLY AS INVESTIGATORY TOOLS AGAINST MINORITY POPULATIONS

Law enforcement policies premised on investigation have historically affected minorities at a higher rate,[4] thus increasing the likelihood that these individuals will come in contact with the criminal justice system. The disproportionate impact of these seemingly neutral police practices is apparent in at least three instances: the Stop and Frisk policy practiced by the New York City Police Department, searches of vehicles of African American and Latino drivers, and finally the implementation and impact of the so-called War on Drugs.

A. Stop and Frisk Law Enforcement Policies have Resulted in Police Practices that Specifically Target Minorities

The "stop and frisk", or more broadly termed, a *Terry* stop, is a seemingly neutral policy designed to

---

[4] *See infra* parts III.A – III.C.

protect police officers while on patrol as well as to deter crime. The policy includes a subjective reasonableness requirement, which demands the police officer use a great deal of discretion. During a stop a[illegible] frisk, an officer detains an individual based on a reasonable suspicion that the individual has engaged in or is about to engage in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 30 (1968). The officer may not conduct a frisk unless he has a reason to suspect that the person is armed or dangerous. *Id.* Another justification for the stop and frisk is that it is thought to make gang and drug crime more risky and less lucrative by increasing the risk of arrest and the difficulty of establishing stable drug-market monopolies. Steven D. Levitt & Sudhir Alladi Venkatesh, *An Economic Analysis of a Drug-Selling Gang's Finances*, 115 Q.J. Econ. 755, 781-82 (2000). Unfortunately, studies have shown the policy tends to be used as a license to stop and frisk a disproportionate number of African Americans and Latinos, resulting in a publicly recognized policy of discrimination.[5]

While police forces across the country use *Terry* stops, because the New York City Police Department (NYPD) has been a particularly ardent proponent of the policy, its disproportionate use against minorities demonstrate the dangers of permitting seemingly neutral, limited identification practices to be used for

---

[5]*See generally*, Joseph Goldstein, *Police Stop-and-Frisk Program in Bronx is Ruled Unconstitutional*, N. Y. Times (Jan. 8, 2013), http://www.nytimes.com/2013/01/09/nyregion/judge-limits-nypd-stop-and-frisk-program-in-bronx.html; James Warren, *Driving While Black*, The Atlantic (July 2009), http://www.theatlantic.com/magazine/archive/2009/07/driving-while-black/307625/; Ctr. for Constitutional Rights, *Stop and Frisk—The Human Impact Report* (July 2012), http://stopandfrisk.org/the-human-impact-report.pdf.

open-ended investigations. In New York City, there has been a six hundred percent increase in the number of *Terry* stops conducted in the city in the past decade. Darius Charney, Jesus Gonzalez, David Kennedy, Noel Leader, Robert Perry, *Suspect Fits Description: Responses to Racial Profiling in New York City*, 14 CUNY L. Rev. 57, 73 (2010).[6] While "the number of stops in 2011 [in New York City] was the largest on record . . . 2012 is on track to be higher still, with over 203,500 stops in the first three months alone." *Id.* According to data from 2011, 84% of the 685,724 stops were of African American or Latino residents while African American and Latino individuals comprise only about 23% and 29% of the city's population, respectively. George Lipsitz, *"In an Avalanche Every Snowflake Pleads Not Guilty:" The Collateral Consequences of Mass Incarceration and Impediments to Women's Fair Housing Rights*, 59 UCLA L. Rev. 1746, 1782-83 (2012).[7] This polarization was less dramatic in the 1990's but has increased with the NYPDs aggressive use of the policy over time to stop and frisk an overwhelming amount of innocent minorities. Greg Ridgeway, *Analysis of Racial Disparities in the New York Police Department's Stop, Question, and Frisk Practices*, http://www.rand.org/pubs/technical_reports/TR534.html.

While proponents argue that police target African Americans and Latinos more than whites because more crime takes place in communities of color, the

---

[6] *See also* Ctr. for Constitutional Rights, *Stop and Frisk-The Human Impact* (July 2012), http://stopandfrisk.org/the-human-impact-report.pdf.

[7] *See also* New York Civil Liberties Union, *Stop and Frisk 2011* (May 9, 2012), http://www.nyclu.org/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf.

New York Civil Liberties Union found that even in neighborhoods where African Americans and Latinos made up 14% or less of the population, police targeted them for 70% of stops. *Id.* Based on police records, 88% of all stops did not result in an arrest or a summons being given. Contraband was found in only 2% of all stops. *Id.* The NYPD claims their stop and frisk policy prevents weapons distribution, but weapons were recovered in only 1% of all stops. *Id.* Additionally, only 5.37 % of stops between 2004 and 2009 even yielded an arrest. Michael Powell, *For New York Police, There's No End to the Stops*, N.Y. Times, (May 14, 2012) http://www.nytimes.com/2012/05/15/nyregion/for-new-york-police-theres-no-end-to-the-stops.html. Furthermore, African American and Latino individuals are stopped more frequently than whites, even after controlling for precinct variability and race-specific estimates of crime participation. Andrew Gelman, Jeffrey Fagan & Alex Kiss, *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. Am. Stat. Ass'n 813, 813 (2007).

Initially, police retained an electronic database of the identity information of all persons stopped and frisked and used it to bolster criminal suspicion in subsequent encounters. Wayne A. Logan, *Policing Identity*, 92 B.U. L. Rev. 1561, 1599 (2012). After the state legislature banned the computer storage of identity information on persons stopped but not arrested, police continued to retain and use such information in paper form under the guise of internal monitoring. *Id.* Similarly, while it is conceivable that at some points during an investigation in which police officers have probable cause to investigate a crime for which a defendant is being currently charged they would need a buccal swab of DNA, the

storage of such information for use in investigation of both past and future crimes for which the police have no objective, particularized reasonable suspicion, much less probable cause, is an affront to the Fourth Amendment and the jurisprudence set forth by this Court. Essentially, the practice of warehousing DNA of arrestees is creating a "reasonable suspicion" or "probable cause" generator—opening up the lives of those who come in contact with the criminal justice system in the most intrusive biological ways. Because evidence shows that a disproportionate number of minorities, and specifically male minorities, come in to contact with the criminal justice system, it can therefore be surmised that the keeping and utilization of this database will have a disproportionate impact upon male minorities not only in Maryland, but all states that have such a statute. The creation and existence of this database serves to erode the Fourth Amendment protections that are afforded to all Americans, but particularly eroding such rights amongst communities of color.

In New York, officers complete a standardized form after a stop that includes a checklist of acceptable reasons. *Floyd v. City of New York*, 813 F. Supp. 2d 417, 422-23, 425 (S.D.N.Y. 2011). The data suggests that the racial disparity which exists amongst individuals who are stopped has more to do with officer bias and discretion than to do with actual crime rates. Charney, *supra*, at 104 (citing Al Baker, *City Minorities More Likely To Be Frisked*, N.Y. Times, May 13, 2010, at A1.). An analysis of Stop and Frisks between 2006 and 2010 broke down the purported reasons for such stops by "acceptable" checklist category: 44.1% stopped for "furtive movement"; 16.7% for "fits description"; and 20.2% for "other". *Stop, Question and Frisk in New York*

Neighborhoods, N.Y. Times (July 11, 2010), http://www.nytimes.com/interactive/2010/07/11/nyregion/20100711-stop-and-frisk.html?ref=nyregion. It appears the NYPD, and presumably police departments in other jurisdictions, operate with different thresholds of reasonable suspicion for different races; African Americans are stopped in situations where whites are left alone. Craig Menchin, *Why NYPD Terry Stops Are More Problematic Than You Think*, 8 Stan. J. Civ. Rts. & Civ. Liberties 299, 310 (2012). Minorities are stopped for nebulous reasons like suspected weapons possession, while whites are generally stopped for a more concrete purpose. *Id.* at 306.

However, a biased administration of the *Terry* stop is not necessarily based on malice; because of the wide discretion police are afforded in whom they stop, subconscious racial biases may arise without intentional unfairness by an officer. "[R]esearchers [have] concluded that unconscious racial stereotypes can be activated in actual criminal justice decision makers and that, once activated, those stereotypes can influence judgments and behavioral intentions . . . [a]lthough officers who treat minorities differently from [w]hites could be acting out of racial animus, it is far more likely that they possess unconscious biases toward minority citizens that are created through either differential exposure to groups involved in deviant or criminal behavior or through illusory correlation mechanisms." Michael R. Smith & Geoffrey P. Alpert, *Explaining Police Bias: A Theory of Social Conditioning and Illusory Correlation* (10th ed. 2007) 34 Criminal Justice and Behavior 1262, 1283 (internal citations omitted).

Similarly, while the Maryland DNA statute may not appear biased on its face, it has the potential,

much like *Terry* stops, to subject a much larger number of innocent minorities to unnecessary searches versus their innocent white counterparts.

B. African American and Latino Drivers Continue to Have Their Vehicles Searched at a Higher Rate During Traffic Stops

Police officers have a large amount of discretion in whom they choose to stop and often times use that discretion to investigate minorities. For instance, pretextual searches occur when police officers pull over drivers for minor offenses such as "burned out tail-lights, unsignaled lane changes, and speeding" and use the encounter as an opportunity to conduct an investigation. Janice Nadler and J.D. Trout, *The Language of Consent in Police Encounters, in Oxford Handbook on Linguistics and Law* (Peter Tiersma ed., 2012). Police incentives to attend to such administrative violations often rest not on the risk posed by the violations themselves, but rather on the opportunity such stops provide for investigating "suspicious" citizens." *Id.* Police officers can use pretext to pull over anyone they see as suspicious, but they are more likely to see African American and Latino men as suspicious. Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. Rev. 956, 987-88 (1999) ("Social scientific research shows that the stereotypic judgments and biases that an individual brings to an event fundamentally shapes perception."). Because "[t]he threshold for labeling conduct as 'criminal' lowers when viewing conduct by people of color," officers may go into encounters with unconscious biases that African American and Latino men engage

in a higher rate of criminal behavior and thus are more likely to be the subject of a pretextual stop.

Traffic stop data across many American cities show that police officers are more likely to view African Americans and Latinos as suspicious, even though the results of these stops prove that African Americans and Latinos are no more likely to commit a crime. For instance, data from Charlotte, Kansas City, Raleigh and St. Louis show that "black drivers were stopped between 1.6 and 2.2 times as often as white drivers."[8] Latino drivers in those same cities were between 0.7 and 1.2 times as likely to be stopped as white drivers.[9] Statistics from Milwaukee, Wisconsin produced even more astonishing results. African American drivers were seven times more likely to be stopped than whites and Latino drivers were five times more likely to be stopped.[10] A 2007 study conducted in Illinois showed that African American drivers were three times more likely to be stopped than white drivers while Latino drivers were twice as likely to be stopped.[11]

Despite the disparities in stopping minority drivers, African American and Latinos are no more likely to carry contraband in their vehicles than

---

[8]Ben Poston, *Disparities are Greater than other Large Metro Police Departments*, Journal Sentinel, Dec. 3, 2011, http://www.jsonline.com/watchdog/watchdogreports/racial-gap-found-in-traffic-stops-in-milwaukee-ke1hsip-134977408.html.

[9]*Id.*

[10]*Id.*

[11]Monique Garcia & Ray Long, *Study Sees Racial Bias in Traffic-Stop Searches,* Chicago Trib., July 24, 2008, http://articles.chicagotribune.com/2008-07-25/news/0807250350_1_consent-searches-white-drivers-hispanics.

white drivers. In the Milwaukee study, the percentage of stops that lead to a finding of contraband were the same across racial lines. Poston, *supra*. In fact, according to an Illinois study, "troopers found contraband in the vehicles of white motorists almost twice as often as they did in the vehicles of blacks and eight times more often than the vehicles of Latino[s]." Garcia & Long, *supra*. If searches of vehicles driven by African American and Latino drivers actually produced more evidence, it could be argued that the disparate rate of stops amongst African Americans and Latinos is justified, but the facts reveal otherwise.

The aforementioned statistics demonstrate that racial biases influence police officers to make determinations as to who is suspicious. Those determinations lead law enforcement agents to stop vehicles so that they can investigate their drivers. Those same biases that lead law enforcement agents to investigate cars driven by African Americans and Latinos at rates higher than other racial groups will lead them to investigate African American and Latino DNA at higher rates.

C. African Americans are Predominately Arrested for Drug Use While all Evidence Suggests Individuals of Other Races Partake in Equal Amounts of Illegal Narcotics use

The "War on Drugs"[12] serves as another example of a neutral law enforcement policy that has

---

[12]"The term the "War on Drugs" refers to the anti-drug policies that were spearheaded by President Reagan in the early 1980's. Kenneth B. Nunn, *Race, Crime and the Pool of Surplus*

disproportionately affected African Americans and other minorities. Despite the seemingly neutral and benevolent goal of battling drug abuse and curbing the illicit businesses fueling drug abuse, since its inception the War on Drugs has had a disproportionate impact on African Americans. *See* Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the War on Drugs Was a War on Blacks,* 6 J. Gender Race & Just. 381, 336 (2002). Both Presidents Reagan and H.W. Bush utilized the War on Drugs as a means to emphasize their concern with public safety. *Id.* at 388. (citing Michael Tonry, *Malign Neglect-Race, Crime, and Punishment in America* 117 (1995)). However, just as all wars require an enemy for the War on Drugs, that enemy has predominately been African Americans. *See* Nunn *supra*, at 390-91. As a result, the War on Drugs has targeted low-income minority communities even though research demonstrates that the sale and use of drugs does not vary widely among races. Michelle Alexander, *The New Jim Crow*, 9 Ohio St. J. Crim. L. 7, 13 (2011) (citation omitted).

Key examples of the disproportionate impact of the drug war on African Americans are the demonstrably disparate arrest rates between African Americans and their peers. From 1980-2003 drug arrests for African Americans increased three times the amount of drug arrests for whites. *See* Ryan S. King, *Disparity by Geography: The War on Drugs in America's Cities*, The Sentencing Project (May 2008) www.sentencingproject.org/doc/publications/dp_drug

---

Criminality: Or Why the War on Drugs Was a War on Blacks, 6 J. Gender Race & Just. 381, 382 n.1, 386-87 (2002).

arrestreport.pdf.[13] While "the proportions of arrested drug offenders should mirror the proportions of drug users," this neutral policy is anything but neutral; its disproportionate impact is a direct result of an uneven practice of arresting minority drug users more often than whites. Kathleen R. Sandy, *The Discrimination Inherent In America's Drug War: Hidden Racism Realized By Examining the Hysteria Over Crack*, 54 Ala. L. Rev. 665, 672-73 (2003)." The claim that African Americans violate the drug laws at a greater rate, and that this justifies the great disparities in rates of arrests and incarceration, is inaccurate. Most drug arrests are made for the crime of possession. Possession is crime that every drug user must commit and, in the United States, most drug users are white." Nunn, *supra* at 395 (citations omitted).

As a facially neutral policy, the War on Drugs has yielded a disproportionate impact upon minorities due to a number of factors, yet there are significant similarities between this policy and the Maryland DNA Collection statute. While the actual taking of DNA samples from arrestees is not a matter of

---

[13]"[D]isproportionate arrests may simply be a function of discriminatory exercise of discretion by police officers. Police officers may decide to arrest African Americans under circumstances when they would not arrest white suspects, and they may be in a position to do so more frequently than with whites because they are more likely to stop and detain African Americans." Nunn, *supra* at 395. (citations omitted). African Americans historically have been harassed and have had their civil rights disregarded by police officers. *Id.* at 401. "However, the war on drugs made the types of police harassment . . [stopping African American drivers, drug sweeps, and over-policing of the African American community] more likely to occur." *Id.*

discretion, there is no check on the discretion of the officers who make the arrests that create the opportunity for DNA sampling until after the sample has been taken and may already have been used for investigative purposes." *People v. Buza*, 129 Cal.Rptr.3d 753, 780-81 (Cal Ct. App. 2011) *reh'g granted People v. Buza*, 262 P.3d 854 (Cal. 2011) (holding that DNA testing of arrestees is a violation of the Fourth Amendment). This risk of misuse is especially a cause for concern for the rights of African Americans due to the racial bias that exists in the criminal justice system. Kevin Lapp & Joy Radice, *A Better Balancing: Reconsidering Pre-Conviction DNA Extraction from Federal Arrestees*, 90 N.C. L. Rev. Addendum 157, 175 (2012). The likely outcome of a statute continually authorizing DNA collection from arrestees is a DNA database of African Americans. *Id.*

As such, the Maryland DNA statute will continue to have a similarly disproportionate impact upon communities of color. The demonstrated disproportionate effect of seemingly neutral police practices on African Americans indicates that the Court should be wary of sanctioning another practice that would likely have the same disproportionate effect. History and practice dictate that the wider the discretion that law enforcement officers have in implementing policies to serve their crime control ends, the more likely that these policies will be used to harass and infringe upon the rights of people of color.

CONCLUSION

The collection and analysis of DNA from individuals arrested but not yet convicted of crimes offends the Fourth Amendment. The State of Maryland's claim that DNA is used to identify

individuals at the time of arrest is contradicted by the plain text of the statute and the time it takes to yield a result after collection. The State's identification rationale shrouds the true purpose of the statute, which is to assist law enforcement in the investigation of crimes. Statutes, like the Maryland DNA statute that have a purpose of generalized crime control, have never been able to pass scrutiny under the Fourth Amendment.

While the expressed purpose of the statute purports to be beneficial in curbing crime, historically there have been a number of law enforcement techniques, seemingly benign on their face, that have yielded disproportionate impacts on African Americans and Latinos. The regular police practice of stopping and frisking African American men because they look suspicious, and targeting low income urban communities serve as stark examples of benign policies with disproportionate impacts. Not only does the statute's purpose violate the Fourth Amendment, its implementation will also disproportionately impact African Americans and Latinos, as these individuals are more often arrested for qualifying crimes under the Maryland statute.

Respectfully submitted,

ADERSON B. FRANÇOIS
Counsel of Record
HOWARD UNIVERSITY
SCHOOL OF LAW
CIVIL RIGHTS CLINIC
2900 Van Ness Street NW
Washington, DC
(202) 806-8065
Afrancois@law.howard.edu

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JAN 2 - 2013
OFFICE OF THE CLERK

No. 12-207

RECORD AND BRIEFS

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MARYLAND,
Petitioner,
v.
ALONZO JAY KING, JR.,
Respondent.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER, THE STATE OF MARYLAND, BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY

JACKIE LACEY
District Attorney of Los Angeles County
IRENE WAKABAYASHI
Head Deputy, Appellate Division
PHYLLIS ASAYAMA
Deputy District Attorney
ROBERTA SCHWARTZ
Deputy District Attorney *Counsel of Record*
Appellate Division
320 West Temple Street, Suite 540
Los Angeles, California 90012
Telephone: (213) 974-1616
Attorneys for Amicus Curiae

TABLE OF CONTENTS

Pages

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER, THE STATE OF MARYLAND, BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY 1

INTEREST OF AMICUS CURIAE 2

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I AN ARRESTEE HAS A SIGNIFICANTLY REDUCED EXPECTATION OF PRIVACY 3

II EXPANSION OF THE DNA DATABASE TO INCLUDE FELONY ARRESTEES AIDS IN THE PURSUIT OF JUSTICE AND EXONERATION OF THOSE WRONGFULLY ACCUSED OF CRIMES WHILE PROTECTING THE PUBLIC 10

III POLICE SHOULD NOT BE BLOCKED FROM LAWFULLY OBTAINING THE MOST RELIABLE MEANS OF IDENTIFICATION 19

IV DNA SAMPLING DURING BOOKING OF A FELONY ARRESTEE IS ANOTHER BIOMETRIC MEASURE OF IDENTITY TO BE INCLUDED IN A DATABASE 23

CONCLUSION 29

TABLE OF AUTHORITIES

	Pages
Cases	
Bell v. Wolfish 441 U.S. 520 (1979)	5
Boroian v. Mueller 616 F.3d 60 (1st Cir. 2010)	7, 10
Coffin v. United States 156 U.S. 432 (1895)	5
Cupp v Murphy 412 U.S. 291 (1973)	26
Davis v. Mississippi 394 U.S. 721 (1969)	4, 26
Florence v. Bd. of Chosen Freeholders of County of Burlington 132 S. Ct. 1510 (2012)	3
Groceman v. U.S. Dept. of Justice 354 F.3d 411 (5th Cir. 2004)	5
Haskell v. Harris 669 F.3d 1049 (9th Cir. 2012)	15
Hayes v. Florida 470 U.S. 811 (1985)	4

Hobbs v. Cappelluti
2012 U.S. Dist. LEXIS 139895
(N.D. Ill. Sept. 28, 2012) 18

Illinois v. Lafayette
462 U.S. 640 (1983) 27

Jones v. Murray
962 F.2d 302 (4th Cir. 1992) 4, 27

People v. Clark
30 Cal. App.3d 549 (1973) 26

People v. Johnson
139 Cal.App.4th 1135 (2006) 26

People v. McInnis
6 Cal. 3d 821 (1972) 25

People v. Robinson
47 Cal. 4th 1104, 1121 (2010) 5, 6, 9

Rise v. Oregon
59 F.3d 1556 (9th Cir. 1995) 4, 6

State ex rel. Bruns v. Clausmeier
154 Ind. 599, 57 N.E. 541 (1900) 25

United States v. Diaz-Castaneda
494 F.3d 1146, 1153 (9th Cir. 2007) 9

United States v. Karo
(1984) 468 U.S. 705 28

United States v. Kelly
55 F.2d 67 (2nd Cir. 1932) 23

United States v. Kincade
379 F.3d 813 (9th Cir. 2004) 5, 11, 12

United States v. Mitchell
652 F.3d 387 (3rd Cir. 2011) 4, 7

Whalen v. Roe
(1977) 429 U.S. 589 19

Codes and Statutes

Cal. Gov't Code § 26500 (West 1998) 2

Los Angeles County Charter section 25 (1995) 1

18 U.S.C. § 3142(g)(3)(A) 8

Other Authorities

Bartha Maria Knoppers, et al., Ethical Issues in Secondary Uses of Human Biological Materials from Mass Disasters,
34 J.L. Med. & Ethics 352 22

Chicago's Study on Preventative Crime, City of Chicago (2005), http://www.dnaresource.com/documents/ChicagoPreventableCrimes-Final. 12

DNA's Accuracy Puts Traditional Forensics on Trial, popular mechanics <http://www.popularmechanics.com/science/health/forenscis/3010536> 10

http://integenx.com/products/rapid-dna/,last viewed December 23, 2012; Forensic Magazine Rapid DNA Analysis 29

http://www.forensicmag.com/print/6882 29

http://www.sciencedaily.com/releases/2010/08/100804122715.htm, last viewed December 23, 2012; Integenx 29

H.R. Rep. No. 106-900(I) at 27. 11

Innocence Project <http://www.innocenceproject.org/Content/Another_false_confession_revealed.php> 17

James J. Killerlane III, Finger Imaging: A 21st Century Solution to Welfare Fraud at our Fingertips, 22 Fordham Urb. L.J. 1327, 1333-34 (1994 24

Jennifer L. Doleac, The Effects of DNA Databases on Crime, at 9 n. 8 (Nov. 2011), available at http://siepr.stanford.edu/?q=/system/files/shared/pubs/papers/Doleac_DNADatabases_0 16

The Police Chief, http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1982&issue_id=12010, 17

Washington Considers Collecting DNA upon Arrest, Forensic Magazine (Feb. 7, 2012), http://www.forensicmag.com/print/5522 14

2003 Army Law. 48 21

No. 12-207

In The
SUPREME COURT OF THE UNITED STATES

STATE OF MARYLAND

Petitioner,

v.

ALONZO JAY KING, JR.

Respondent.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER, THE STATE OF MARYLAND, BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY

Amicus curiae, Jackie Lacey, District Attorney for the County of Los Angeles, State of California, submits this brief for filing in support of the petitioner as the authorized law officer of the county, pursuant to Supreme Court Rule 37.2(a) and 37.4.[1]

---

1. Los Angeles County Charter section 25 (1995) states:

> Each County officer, Board or Commission shall have the powers and perform the duties now or hereafter prescribed by general law, and by this charter as to such officer, Board of Commission.

(Footnote omitted.) It is provided in the California general law that:

> The district attorney is the general prosecutor, except as otherwise provided by law. The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct

(continued...)

INTEREST OF AMICUS CURIAE

Amicus curiae, as the executive officer charged with the prosecution of crime in the most populous county in California, has a strong interest in the effective enforcement of the laws of the state.

SUMMARY OF ARGUMENT

California is one of the 28 states participating in the Combined DNA Index System [hereinafter CODIS] by submitting DNA samples obtained from felony arrestees. Requiring a person who is arrested for a felony, based on probable cause, to submit a DNA sample during the booking process is not an impermissible search. It is a minimal intrusion which establishes with absolute certainty the identification of the arrestee. This data, along with his booking photograph, fingerprints, photographs of tattoos, height and weight measurements, address, hair and eye color descriptions, and other driver's license information, are incorporated into a database which may be accessed at a later time for comparison to data from other crimes. Resolution of open cases, reopening cases of convicted persons, and protection of society outweigh the minimal intrusion of an arrestee's reduced expectation of privacy.

//

//

//

(...continued)

> on behalf of the people all prosecutions for the public offenses.

CAL. GOV'T CODE § 26500 (West 1998).

ARGUMENT

I

AN ARRESTEE HAS A SIGNIFICANTLY REDUCED EXPECTATION OF PRIVACY

The Court below clearly erred in rejecting a minimally intrusive method of obtaining biometric data from arrested felons.

The felony arrestee can be photographed, fingerprinted, and even asked to remove clothing for examination and photographing of tattoos, scars and marks. He or she can be subjected to an intrusive body cavity search. *Florence v. Bd. of Chosen Freeholders of County of Burlington*, 132 S. Ct. 1510, 1523, 182 L. Ed. 2d 566 (2012).

The arrestee's height, weight and hair color are recorded along with his or her name, address, social security number, driver's license information and employment data. Clearly, a DNA profile adds a significant biometric measure of identity without devaluing or compromising lingering expectations of privacy by the arrestee. Obtaining a DNA sample by swabbing the cheek is minimally intrusive and likely to be the least memorable event of the booking process. Indeed, some may consider the physical manipulation by the custodial officer of the arrestee's hands and fingers more intrusive and demeaning than the simple swabbing of a cheek.

> The dissent suggests that our comparison to traditional fingerprinting is inapt because fingerprints "are personal attributes that are routinely exposed to the public at large in daily life" and, accordingly, the gathering of fingerprints,

> unlike the drawing of blood, implicates "a categorically different and lesser expectation of privacy." Dissenting Op. at 29. However, the fingerprints gathered by law enforcement officials and included in fingerprint identification data banks are not ones that have been left behind voluntarily on doorknobs and water glasses. They are the ones gathered by holding the person's hand firmly and taking the prints. Much like the process of providing a blood sample, providing one's fingerprints can be quick and simple if one submits voluntarily, but has the potential for the use of force if resisted. It is for this reason that, outside the "booking" process to which we analogize, courts do generally require some level of individualized suspicion to support the seizure necessary to gather a person's fingerprints.

Rise v. Oregon, 59 F.3d 1556, 1560 n.2 (9th Cir. 1995) (citing *Hayes v. Florida,* 470 U.S. 811, 813-18, 105 S. Ct. 1643, 1645, 84 L. Ed. 2d 705 (1985); *Davis v. Mississippi,* 394 U.S. 721, 726-28, 89 S. Ct. 1394, 1397, 22 L. Ed. 2d 676 (1969) *overruled on other grounds by City of Indianapolis v. Edmond,* 531 U.S. 32, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000).

The reduced expectation of privacy of felony arrestees has been recognized by federal circuit courts. *See, Jones v. Murray,* 962 F.2d 302, 306-07 (4th Cir. 1992), *United States v. Mitchell,* 652 F.3d 387, 410-12 (3rd Cir. 2011).

The presumption of innocence does not alter the expectation of privacy of arrestees or defendants in custody awaiting trial.

> Without question, the presumption of innocence plays an important role in our criminal justice system. "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895). But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.

Bell v. Wolfish, 441 U.S. 520, 533 (1979).

The observation that arrestees have a reduced expectation of privacy was noted in *United States v. Kincade,* 379 F.3d 813, 837 (9th Cir. 2004) and recently cited with approval by the California Supreme Court in *People v. Robinson* 47 Cal. 4th 1104, 1121 (2010).

> With regard to any privacy interest in identifying information, it is established that individuals in lawful custody cannot claim privacy in their identification. "Though, like fingerprinting, collection of a DNA sample for purposes of identification implicates the Fourth Amendment, persons incarcerated after conviction retain no constitutional privacy interest against their correct identification." [*Groceman v. U.S. Dept. of Justice*, 354

> F.3d 411, 413–414 (5th Cir. 2004)]. In *Kincade*, the court explained that "the DNA profile derived from the defendant's blood sample establishes only a record of the defendant's identity-otherwise personal information in which the qualified offender can claim no right of privacy once lawfully convicted of a qualifying offense **(indeed, once lawfully arrested and booked into state custody)**. For, as we recognized in *Rise* "[o]nce a person is convicted of one of the felonies included as predicate offenses under [the Act], his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from blood sampling." [*Rise*, 59 F.3d 1556 (9th Cir. 1995)].

People v. Robinson , 47 Cal. 4th 1104, 1121 (2010) (emphasis added) (citations omitted).

The absence of a legitimate expectation of privacy at booking is well established.

> Boroian suggests that the government does not need his DNA profile for "identification" purposes because it already has other means of identification, such as his fingerprints and social security number. However, the fact that the government may lawfully retain and access these more traditional means of identifying Boroian only emphasizes that the government's retention and matching of his DNA

> profile does not intrude on Boroian's legitimate expectation of privacy. At present, Boroian's DNA profile simply functions as an additional, albeit more technologically advanced, means of identification.

Boroian v. Mueller, 616 F.3d 60, 67 (1st Cir. 2010).

Obviously government has a strong interest in ascertaining with certainty the identity of those who are arrested for felonies. That identification is clearly enhanced if DNA is sampled and included in CODIS. A suspect who is arrested for theft and has a DNA sample matched to the profile of an unknown murder suspect from 2002 should not be eligible for own recognizance release. An arrestee's potential involvement in other unsolved crimes is a factor in determining pretrial release. This was recently recognized by the court in *Mitchell*, 652 F.3d 387, which upheld the gathering of DNA samples from federal arrestees.

> [T]here are two components to a person's identity: "who that person is (the person's name, date of birth, etc.) and what that person has done (whether the individual has a criminal record, whether he is the same person who committed an as-yet unsolved crime across town, etc.)." The second component—what a person has done—has important pretrial ramifications. Running an arrestee's DNA profile through CODIS could reveal matches to crime-scene DNA samples from unsolved cases. Whether an arrestee is possibly implicated in other crimes is

> critical to the determination of whether or not to order detention pending trial. *See* 18 U.S.C. § 3142(g)(3)(A) (stating that factors to be considered in the bail determination include a person's "past conduct" and "criminal history"). To the extent that DNA profiling assists the Government in accurate criminal investigations and prosecutions (both of which are dependent on accurately identifying the suspect), it is in the Government's interest to have this information as soon as possible. Collecting DNA samples from arrestees can speed both the investigation of the crime of arrest and the solution of any past crime for which there is a match in CODIS. Moreover, "use of CODIS promptly clears thousands of potential suspects—thereby preventing them from ever being put in that position, and advancing the overwhelming public interest in prosecuting crimes accurately." The assistance provided by CODIS is not hypothetical: as of May 2011, CODIS "ha[d] produced over 144,400 hits assisting in more than 138,100 investigations." FBI, CODIS-NDIS Statistics, available at http://www.fbi.gov/about-us/lab/codis/ndis-statistics (last visited July 8, 2011).

Id. at 414-15 (citations omitted).

As will be discussed below, this interest in correctly identifying the arrestee weighs heavily in

favor of DNA collection against the reduced expectation of privacy by a felony arrestee.

> Reasonableness ... is measured in objective terms by examining the totality of the circumstances, and whether a particular search meets the reasonableness standard is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.

Robinson, 47 Cal. 4th at 1120 (internal quotations and citations omitted).

The Maryland Appellate Court's flawed analysis that imagines a "second search" when investigators accessed the DNA database leads to absurd results. JA 140.

> That is, there is no constitutional basis for complaint when the police properly obtain information located in a driver's license or state ID card, and then use it to access additional non-private (but inculpatory) information about the document's owner.

United States v. Diaz-Castaneda, 494 F.3d 1146, 1153 (9th Cir. 2007).

Just as accessing a fingerprint or photgraphic database is not a "second search," accessing the DNA database is not a "second search."

> Other precedents hold that the government's matching of a lawfully obtained identification record against other records in its lawful possession does

> not infringe on an individual's legitimate expectation of privacy.

Boroian v. Mueller, 616 F.3d at 67.

II

EXPANSION OF THE DNA DATABASE TO INCLUDE FELONY ARRESTEES AIDS IN THE PURSUIT OF JUSTICE AND EXONERATION OF THOSE WRONGFULLY ACCUSED OF CRIMES WHILE PROTECTING THE PUBLIC

The premise that DNA technology is unnecessary for identification given the existence of fingerprints is in error. JA 148. Fingerprint comparison is subject to human interpretation and has resulted in errors. One documented case resulted in an innocent man freed by a DNA comparison after a conviction was secured based upon a fingerprint comparison.

In May 1997, a Boston Police Officer was shot with his own gun after a struggle with his assailant. *DNA's Accuracy Puts Traditional Forensics on Trial*, POPULAR MECHANICS <http://www.popularmechanics.com/science/health/forenscis/3010536> (last visited December 22, 2012). Stephan Cowans was later identified by the officer and another witness as the assailant. A key piece of evidence was a fingerprint left behind by the assailant while running from the officer. The fingerprint was identified as belonging to Cowans. *Id.* After serving over five years of a 35-to 50-year sentence, DNA evidence from a cap and sweatshirt left behind by the assailant was analyzed and found not to match Cowans's DNA. A new comparison of the fingerprints was done by an independent

examiner who determined that the original print comparison was in error. *Id.* Cowans was exonerated and freed in 2004. *Id.*

As noted in the dissent in the opinion below, speculation over elaborate fantasies about potential abuse of information stored in the "junk" DNA[2] being stored in CODIS is not well-taken. JA 160-161.

> [B]eyond the fact that the DNA Act itself provides protections against such misuse, our job is limited to resolving the constitutionality of the program before us, as it is designed and as it has been implemented. In our system of government, courts base decisions not on dramatic Hollywood fantasies, *cf. post* at 11493, but on concretely particularized facts developed in the cauldron of the adversary process and reduced to an assessable record. If, as *Kincade's* aligned amici and Judge Reinhardt's dissent insist, and when, some future program permits the parade of horribles the DNA Act's opponents

---

2. Through the use of short tandem repeat technology ("STR"), the Bureau analyzes the presence of various alleles located at 13 markers (or loci) on DNA present in the specimen. These STR loci are each found on so-called "junk DNA"--that is, non-genic stretches of DNA not presently recognized as being responsible for trait coding --and "were purposely selected because they are not associated with any known physical or medical characteristics." H.R. Rep. No. 106-900(I) at 27. *Kincade*, 379 F.3d at 818.

> fear--unregulated disclosure of CODIS profiles to private parties, genetic discrimination, state-sponsored eugenics, and (whatever it means) the use of CODIS somehow "quite literally, to eliminate political opposition," *post* at 11487--we have every confidence that courts will respond appropriately. As currently structured and implemented, however, the DNA Act's compulsory profiling of qualified federal offenders can only be described as minimally invasive--both in terms of the bodily intrusion it occasions, and the information it lawfully produces.

Kincade, 379 F.3d at 837-38.

A Chicago study which advocated sampling felony arrestees cited a number of cases and statistics in support of DNA collection. *See*, *Chicago's Study on Preventative Crime*, CITY OF CHICAGO (2005), *available at* http://www.dnaresource.com/documents/ChicagoPreventableCrimes-Final.pdf (last visited December 22, 2012). One case cited in the study is illustrative. Geoffrey Griffin was arrested for felony possession of drugs on August 26, 1995. No DNA sample was taken at the time of his arrest and he was not convicted. In July of 1998, a woman was raped and killed by Griffin and DNA evidence was recovered from the crime scene. Griffin was not immediately connected to the crime because there was no DNA sample taken during the initial felony arrest. Between July 1998 and June 2000, eight more women were murdered and one was raped, but

survived. Griffin was finally arrested in June of 2000 and charged with eight murders and one sexual assault. If a DNA sample had been taken and placed with CODIS in 1995, Griffin could have been identified and arrested after the July 1998 murder, and the subsequent eight murders could have been prevented. That was one example illustrating how a DNA sample collected after a felony arrest could have prevented future violent crimes while solving past crimes.

Another example of the importance of arrestee DNA sampling is provided in the case of Anthony Dias.

> Anthony Dias is the poster boy for why police and prosecutors hope Washington will join a growing number of states that require people to give DNA samples as soon as they're arrested in a serious crime, rather than when they're convicted.
>
> In 2005, Dias was released on bail while facing a felony hit-and-run charge in Pierce County. Before the year was up, he went on to commit crimes—including half a dozen rapes—against 19 more people. If he had given a DNA sample after his hit-and-run arrest, detectives could have caught him after the first rape—not the last.
>
> "By the time he committed his next rape crime, he could have been identified, arrested, and taken off the streets," Charisa Nicholas, who was tied up and forced to watch as her roommate was

> raped, told lawmakers recently. "My case would have been the first case prevented."

Washington Considers Collecting DNA upon Arrest, FORENSIC MAGAZINE (Feb. 7, 2012), http://www.forensicmag.com/print/5522 (last visited December 22, 2012).

While many of the examples theorize future crime prevention, there is also a compelling case for how a rational expansion of the DNA database unlocks prison doors for the innocent.

> DNA databases have proven remarkably effective in exonerating the innocent. According to the Innocence Project, there have been 273 post-conviction DNA exonerations in the United States since 1989. In 123 of the cases, the true suspects or perpetrators were also identified. The case of David Allen Jones is a powerful illustration of the benefits of arrestee DNA sampling. Jones, a mentally disabled janitor, was wrongly convicted in 1995 for three murders in the Los Angeles area. See Andrew Blankstein, et al., DNA Analysis Links Inmate to 12 Slayings, L.A. Times, Oct. 23, 2004, at A1. Jones spent nearly nine years in prison. He was released in 2004, after DNA collected at two of the murder scenes was linked to the DNA profile of Chester Dwayne Turner. Although Turner had been arrested 20 times between 1987 and 2002, his DNA sample was not collected until after he was convicted of rape in 2002. *Id.* Had the 2004 Amendment been in effect in 1995, it is

> likely that Jones never would have been imprisoned because police would have had access to Turner's DNA profile. There are few greater injustices than the wrongful imprisonment of an innocent person. The privacy intrusion caused by a buccal swab of a felony arrestee is minor compared to society's compelling goal of ensuring that innocent people are exonerated.

Haskell v. Harris, 669 F.3d 1049, 1064-65 *reh'g en banc granted*, 686 F.3d 1121 (9th Cir. 2012).[3]

Expansion of the DNA databases to include arrestees can only help further the efforts of groups such as Project Innocence to exonerate the wrongfully convicted.

> Showing that DNA evidence does not match a convicted offender is often not enough to exonerate him. In an interview with the Council for Responsible Genetics, Peter Neufeld, co-founder of the Innocence Project, described how DNA databases help exonerate wrongly-convicted individuals: "There are occasions where we get a DNA test result on a material piece of evidence from a crime scene which would exclude our client, but prosecutors still resist motions to vacate the conviction. In some of those cases, what then tipped the balance in our favor was that the profile of the unknown individual

---

3. *Haskell v. Harris* is referenced only for its recitation of factual scenarios in which DNA played a role, and not for any legal precedent.

> [whose DNA was found at the crime scene] was run through a convicted offender database and a hit was secured. Once we were able to identify the source of the semen or blood... we were then able to secure the vacation of the conviction for our client." He went on to add, "There's no question that there would be fewer wrongful convictions if there was a universal DNA databank." (CRG Staff, 2011) In 2007, Barry Scheck, the other co-founder of the Innocence Project, told the New York Times that "many of the people his organization had helped exonerate would have been freed much sooner, or would not have been convicted at all" if state databases included profiles from all convicted offenders.

Jennifer L. Doleac, *The Effects of DNA Databases on Crime*, at 9 n.8 (Nov. 2011), *available at* http://siepr.stanford.edu/?q=/system/files/shared/pubs/papers/Doleac_DNADatabases_0.pdf (last visited December 22, 2012) (citations omitted). While Mr. Scheck's comments related directly to profiles of convicted offenders, expanding the databases to include persons arrested for felonies could only assist efforts to determine the truth. The compelling state interest in preventing rapes, solving murders and freeing the wrongfully imprisoned offsets any privacy interest in a simple swab of the cheek during the booking process.

A dramatic illustration of this state interest is provided by Robert Gonzales in New Mexico. Victoria Sandoval, 11 years old, was raped and murdered during a burglary in 2005. Gonzales, who

had a history of mental health issues, confessed to the crime although the hair and semen samples did not implicate him. Gonzales spent nearly three years in custody facing murder/rape charges before the DNA taken from the murder scene matched an arrestee, Israel Diaz in 2008. Diaz had been arrested for burglary in New Mexico, which provided for DNA to be taken from arrestees. As an illegal alien, Diaz may never have been convicted, only deported and his DNA would never have been obtained if arrestees were not included in the database. Gonzales was finally freed and Diaz was convicted because of the DNA taken from a felony arrestee. The Police Chief, available at http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1982&issue_id=12010, (last visited December 22, 2012.); The Innocence Project, available at http://www.innocenceproject.org/Content/Another_false_confession_revealed.php, (last visited December 22, 2102.)

Jerry Hobbs spent five years in jail in Illinois for the 2005 murder of his 8-year-old daughter and her 9-year-old friend. His charges were based on a confession he later retracted, claiming his confession had been coerced. One of the girls had semen on her body that did not match Hobbs. Another man in Virginia, Jorge Torres, was arrested for the murder of a woman. His DNA was entered into the database after his arrest and matched the semen on the dead girl. Torres was an acquaintance of the murdered 9-year-old girl's brother. Hobbs was freed and Torres was convicted of the murders of the two children. In one respect Hobbs was fortunate. Torres was arrested in

Virginia, which tested arrestees' DNA unlike Illinois which did not at that time. *Hobbs v. Cappelluti*, 2012 U.S. Dist. LEXIS 139895 (N.D. Ill. Sept. 28, 2012).

A study by the Rand Corporation criticized the economics of including arrestee DNA profiles in the DNA databases. Rand Center on Quality Policing *Toward a Comparison of DNA Profiling and Databases in the United States and England*, 2010 http://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR918.pdf, (last visited on December 23, 2012,) [hereafter "Rand"]. The suggestion based on admittedly incomplete data, was that the backlog of crime scene samples would be better cleared before gathering DNA from arrestees. Rand at p. 20. The study was also somewhat cavalier in discussing the possibility of exonerations.

> A DNA database is not necessary for exonerating the innocent unless an individual is being prosecuted or imprisoned despite weak or exculpatory DNA evidence, and the database helps identify the actual perpetrator.'

Rand at p.14.

The observations, based on a cost/benefit analysis, offer little consolation to defendants spending years in custody for crimes committed by others. Opponents of DNA testing for arrestees have attempted to bolster their arguments against arrestee testing by pointing to the Rand study. This argument ignores the human cost and the requirement that the Legislature and the electorate determine the wisdom of the policy. The courts evaluate the constitutionality of the laws.

> State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part. For we have frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern.

Whalen v. Roe 429 U.S. 589, 597, fn. omitted. (1977)

III

POLICE SHOULD NOT BE BLOCKED FROM LAWFULLY OBTAINING THE MOST RELIABLE MEANS OF IDENTIFICATION

Irrational fears derived from science fiction fantasies should not be relied upon to deny law enforcement the "gold standard" of identification methods. The influence of such Hollywood created scenarios are clear in the case below, exemplified by a footnote referencing a John Travolta movie "Face Off" to explain that there may be cases where advanced face transplants require the police to obtain the face transplantee's DNA profile to ascertain his or her identity. JA 151 n.35.

The United States Military has adopted DNA technology as the most reliable means of identification. Every member of the United States military, from sailors to the Chairman of the Joint Chiefs of Staff, and every new recruit, is required to submit a DNA sample for the military database, also known as a Repository. This is done for two purposes, the identification of remains and for criminal investigations.

The Department of Defense (DOD) began to use DNA samples to identify the remains of service members during the first Gulf War in 1991. "Because of problems with obtaining reliable DNA samples during the Gulf War, the DOD began a program to collect and store reference specimens of DNA from members of the active duty and reserve forces." What was then called the "DOD DNA Registry," program within the Armed Forces Institute of Pathology, was established pursuant to a December 16, 1991 memorandum of the Deputy Secretary of Defense. Under this program, DNA specimens are collected from active duty and reserve military personnel upon their enlistment, reenlistment, or preparation for operational deployment.

As of December 2002, the Repository, now known as the "Armed Forces Repository of Specimen Samples for the Identification of Remains," contained the DNA of approximately 3.2 million service members. According to a recent DOD directive, the "provision of specimen samples by military members shall be mandatory." The direction to a soldier, sailor, airman, or marine to contribute a DNA sample is a lawful order which, if disobeyed, subjects the service member to prosecution under the Uniform Code of Military Justice (UCMJ). If convicted at court-martial for the offense of violating a lawful general order, the service member

> carries the lifelong stigma of a federal felony conviction, and faces a maximum punishment of a dishonorable discharge, confinement for two years, total forfeiture of all pay and allowances, and reduction to the lowest enlisted grade.
>
> As its name suggests, the DNA Repository was initially conceived solely to identify the remains of service members. However, a small entry in the huge 2003 National Defense Authorization Act, "signed by President Bush on December 2, 2002, overrides Pentagon policy that the DNA samples be used almost solely to identity troops killed in combat," and allows access to the Repository for law enforcement purposes. The provision reads: § 1565a. DNA samples maintained for identification of human remains: use for law enforcement purposes
>
> (a) Compliance with a court order.[4]

2003 Army Law. 48, fn. omitted.

DNA technology has become so commonplace that for a fee, consumers wishing to trace their family tree now can provide their own buccal swabs for testing. *See*, GENETIC GENEALOGY, http://www.dnaancestryproject.com/ydna_intro_howto.php (last visited December 22, 2012). Even pet owners can use buccal swabs to test their dog's DNA for breed ancestry. *See*, DOG-DNA,

---

4. In 2003, National Defense Authorization Act expanded the Repository uses to include criminal prosecutions.

http://www.wisdompanel.com// (last visited December 22, 2012).

It is well known that in the aftermath of disasters such as Hurricane Katrina, the 9-11 attacks and the Tsunami in Japan, DNA is widely used to identify the victims by comparing recovered remains to relatives' toothbrushes and personal effects. Bartha Maria Knoppers, *et al.*, *Ethical Issues in Secondary Uses of Human Biological Materials from Mass Disasters*, 34 J.L. MED. & ETHICS 352, 352. Such access, affordability and routine use of DNA tests have enhanced the reputation for accuracy and reliability of DNA testing. Its availability to the everyday consumer reduces, if not completely eliminates, any sense of embarrassment or stigma attached to the swabbing of the cheek.

In 1932, Mortimer Kelly was arrested for selling gin and was fingerprinted. He complained that he suffered indignity at being fingerprinted. Judge Learned Hand wrote:

> Finger printing seems to be no more than an extension of methods of identification long used in dealing with persons under arrest for real or supposed violations of the criminal laws. It is known to be a very certain means devised by modern science to reach the desired end, and has become especially important in a time when increased population and vast aggregations of people in urban centers have rendered the notoriety of the individual in the community no longer a ready means of identification.

United States v. Kelly, 55 F.2d 67, 69 (2nd Cir. 1932).

Judge Hand went on to note that fingerprinting was becoming widespread in 1932.

> Finger printing is used in numerous branches of business and of civil service, and is not in itself a badge of crime. As a physical invasion it amounts to almost nothing, and as a humiliation it can never amount to as much as that caused by the publicity attending a sensational indictment to which innocent men may have to submit.

Id. at 70. The same can be said for the use of DNA today. The police could have adequately identified Mortimer with a photograph and he may have been well-known in his community. However, they did not have to reject a more accurate means of identification just because it was not necessary to identify Mortimer Kelly in 1932 with a new technological tool of fingerprints. Here too, as in 1932, DNA identification, should not be prohibited just because other methods of identification are available.

IV

DNA SAMPLING DURING BOOKING OF A FELONY ARRESTEE IS ANOTHER BIOMETRIC MEASURE OF IDENTITY TO BE INCLUDED IN A DATABASE

The DNA sampled from a swab of the cheek obtained during booking is merely another biometric identifier, like a booking photo, fingerprint, height or weight measurement, eye or hair color description, or

a photograph of tattoos, that is collected as part of an arrestee's booking process.

> Biometrics involves the scanning or recording of some unique personal characteristic, such as a fingerprint, a retinal print or voice pattern and the comparison of the digitized image or recording against a verified database for positive identification. Digital imaging, the technology involved in finger imaging, is already a basic component of a myriad of applications ranging from document management to medical radiology to videoconferencing, and its contribution to the field of biometrics makes the current technology of finger imaging possible. In finger imaging, the technology converts a fingerprint into a highly detailed and exact electronic image that a computer can interpret and compare to other images.

James J. Killerlane III, *Finger Imaging: A 21st Century Solution to Welfare Fraud at our Fingertips*, 22 FORDHAM URB. L.J. 1327, 1333-34 (1994).

Other biometric identifiers, especially photographs and prints, have been incorporated for years into a collection or databases. These databases have been used for authenticating the identity of the person in custody and for intelligence in crime solving. When an unknown sample is recovered from a crime scene (fingerprint, hair, blood, video capture, etc.), that sample can be compared to known exemplars by sifting through available databases.

Booking photos were incorporated into "mug books" long before computers were available to digitize the photographs. In 1900, a defendant challenged the taking of his photograph upon arrest and inclusion of that photo in the "Sheriff's Rogues Gallery." *State ex rel. Bruns v. Clausmeier*, 154 Ind. 599, 57 N.E. 541 (1900). The Indiana Supreme Court refused to reject the use of a relatively new invention and held that the sheriff was acting within his lawful authority:

> It would seem, therefore, if, in the discretion of the sheriff, he should deem it necessary to the safe-keeping of a prisoner and to prevent his escape, or to enable him the more readily to retake the prisoner if he should escape, to take his photograph, and a measurement of his height, and ascertain his weight, name, residence, place of birth, occupation and the color of his eyes, hair, and beard, as was done in this case, he could lawfully do so.

Id. at 542.

Even booking photos from an illegal arrest were allowed to remain in the "database" or mug book and could result in a subsequent prosecution if that photograph was selected by another witness in an unrelated crime. *People v. McInnis*, 6 Cal. 3d 821, 825-26 (1972).

For years, fingerprints have been gathered to identify an arrested suspect. Courts have held that fingerprints taken at booking after a felony arrest that are later challenged as illegally seized can still be used to connect defendants to other offenses. There is no requirement that they be purged later if

the arrest is invalidated. *People v. Clark*, 30 Cal. App.3d 549, 558-59 (1973). An exception to this rule is found in a 'dragnet' case where all young African-American men were detained and printed in Meridian, Mississippi in a clearly illegal sweep conducted just to obtain fingerprints; there was no evidence that the young men who were detained were ever in lawful custody. *Davis v. Mississippi*, 394 U.S. 721, 727-28.(1969).[5]

The Court below suggests DNA is impermissible because it is used solely for investigation, i.e., whether arrestees have committed other unsolved crimes. JA 146-147. However, photo recognition software may allow the use of a booking photo of an identified arrestee to be compared to countless unknown faces represented in video captures of unsolved crimes. The ability to access the database of photographs for intelligence from past crimes does not bar the taking of the arrestee's photo at booking as an unconstitutional search.[6]

---

5. This distinction was also later noted by the Supreme Court .

> The respondent in this case, like *Davis*, was briefly detained at the station house. Yet here, there was, as three courts have found, probable cause to believe that the respondent had committed the murder. The vice of the detention in *Davis* is therefore absent in the case before us.

Cupp v Murphy 412 U.S. 291, 294-295 (1973).

6. The potential photo recognition software searching a DMV photo database was discussed as a potential example similar to DNA database searches in *People v. Johnson* 139 Cal.App.4th 1135, 1150-1151(2006).

In California, it was not until the initiation of the California Identification System ("Cal ID") in 1985, that latent prints of an unknown suspect lifted from crime scenes could be compared to a collection of fingerprints.[7] CAL ID enables law enforcement to use a known exemplar from an arrestee and compare it to unsolved crimes. The technological leap that allowed searching a database with an arrestee's fingerprints in order to determine what, if any, other offenses he or she committed, did not convert the rolling of the arrestee's fingerprints at booking into an unconstitutional search.

These biometric identifiers discussed above are all part of the need to identify the arrestee, which includes what he or she has done. The courts have traditionally recognized the need to ascertain the true identity of an arrestee, which is relevant not only to solving the current crime but to solve past and future crimes as well. *See supra*, pp. 6-7; *Jones v. Murray*, 962 F.2d at 306-07.

While not specifically recognizing what can be termed a "true identity" exception authorizing searches, the United States Supreme Court has recognized, in a plurality decision, the need for an inventory search, which may assist in ascertaining or verifying the arrestee's identity. *Illinois v. Lafayette*, 462 U.S. 640, 647(1983). The "true identity" exception applies to DNA genotyping as much as it does to fingerprinting or photographs. All these biometric identifiers can be included in a database, accessible for intelligence as to other crimes, and should be covered under the true identity exception.

---

7. See Cal. Pen. Code sec. 11112.1 et. seq.

"[T]he use of database searches as a means of identifying potential suspects is not new or novel." *Johnson,* 139 Cal.App.4th at 1149.

The specter of hypothetical misuse of DNA samples should not distort Fourth Amendment analysis here. The court below acknowledged that there are built-in safeguards against misuse of information but argued that it "could not turn a blind eye to the vast genetic treasure map that remains in the DNA sample retained by the State. JA 143.

> To be sure, it created a potential for an invasion of privacy, but we have never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment. A holding to that effect would mean that a policeman walking down the street carrying a parabolic microphone capable of picking up conversations in nearby homes would be engaging in a search even if the microphone were not turned on. It is the exploitation of technological advances that implicates the Fourth Amendment, not their mere existence.

United States v. Karo, 468 U.S. 705, 712 (1984).

Misuse of the information contained in the DNA sample retained by the police is highly speculative and completely illegal. Any incentive for a potential violation depends to some extent on an imagined demand for a costly intrusion into the specific DNA samples. Other information gleaned from arrestee booking, such as social security numbers, date of birth, home addresses would provide a treasure trove for identity thieves and anyone wishing to learn

about the credit history, spending practices and employment history of an arrestee. That potential exists now and is not a futuristic fantasy. The potential intrusion does not proscribe law enforcement from gathering the arrestees' identifiers within the shield of existing safeguards.

DNA identification is still the most reliable, immutable identifier that may take as few as two or as long as thirty days to compare to the database.[8] As a biometric identifier, a DNA profile is one more method to establish who has been arrested for the felony. The Fourth Amendment did not create a constitutional straightjacket that allows two biometric identifiers (photos and fingerprints) but excludes the most reliable.

CONCLUSION

It would be a mistake to discard a scientifically proven, minimally invasive technology which has the potential to save lives, protect potential victims, and free the wrongfully convicted due to fears of a futuristic imagined tyranny. The Constitution does not require our society to cower in fear of the future.

---

8. We can expect the time required for comparison to CODIS to be shortened to one to two hours in the very near future. A number of machines are being successfully tested. Science Daily http://www.sciencedaily.com/releases/2010/08/100804122715.htm, last viewed December 23, 2012; Integenx http://integenx.com/products/rapid-dna/, (last visited December 23, 2012); Forensic Magazine Rapid DNA Analysis http://www.forensicmag.com/print/6882, (last viisited December 23, 2012).

Respectfully submitted,

JACKIE LACEY
District Attorney of
Los Angeles County

By

IRENE WAKABAYASHI
Head Deputy District Attorney
Appellate Division

PHYLLIS ASAYAMA
Deputy District Attorney

ROBERTA SCHWARTZ
Deputy District Attorney (*Counsel of Record*)

Attorneys for Amicus Curiae in
Support of Petitioner

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JAN 2 - 2013
OFFICE OF THE CLERK

No. 12-207

In the
Supreme Court of the United States

STATE OF MARYLAND,

PETITIONER,

v.

ALONZO JAY KING, JR.,

RESPONDENT.

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF OF SUSANA MARTINEZ, GOVERNOR OF THE STATE OF NEW MEXICO, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JESSICA M. HERNANDEZ
MATTHEW J. STACKPOLE
STEVEN E. BLANKINSHIP
OFFICE OF THE GOVERNOR
490 Old Santa Fe Trail #400
Santa Fe, NM 87401
(505) 476-2200

JEFFREY S. BUCHOLTZ
Counsel of Record
KAREN GROHMAN
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, DC 20006
(202) 737-0500
jbucholtz@kslaw.com

Counsel for Susana Martinez, Governor of the State of New Mexico

January 2, 2013

TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. The State Has a Strong Interest in Obtaining DNA from Felony Arrestees. 6

A. Collecting DNA From Felony Arrestees Helps States Solve Serious Crimes. 7

B. DNA Collection Also Helps States Identify Arrestees. 11

1. The State's Interest in Solving Crimes Does Not Undermine Its Collection of DNA for Identification Purposes. 12

2. DNA Collection Is a Valuable Means of Identifying Arrestees. 13

II. The Cost to Constitutional Values Is Minimal 17

A. The Statute Protects Arrestees' Privacy Because It Contains Myriad Safeguards. 19

B. The Court Below's Concerns Are Unfounded 22

1. The "Warrantless" Nature of the Search Is Irrelevant Because the Statute Fulfills the Same Purpose Served by Requiring a Warrant. 22

2. Collecting DNA from Arrestees Does Not Prejudice Their Trial Rights.....25

CONCLUSION 26

TABLE OF AUTHORITIES

Cases

Camara v. Municipal Court,
387 U.S. 523 (1967) 23

Chimel v. California,
395 U.S. 752 (1969) 12

Crawford v. Washington,
541 U.S. 36 (2004) 25

Daubert v. Merrell Dow Pharm., Inc.,
509 U.S. 579 (1993) 14, 15

Delaware v. Prouse,
440 U.S. 648 (1979) 18, 23

Donovan v. Dewey,
452 U.S. 594 (1981) 23

Florence v. Bd. of Chosen Freeholders,
132 S. Ct. 1510 (2012) 4, 18

Hiibel v. Sixth Judicial Dist. Court,
542 U.S. 177 (2004) 13

Illinois v. Lafayette,
462 U.S. 640 (1983) 13

Maryland v. Buie,
494 U.S. 325 (1990) 12

Melendez-Diaz v. Massachusetts,
557 U.S. 305 (2009) 25

NARA v. Favish,
541 U.S. 157 (2004) 21

New Jersey v. TLO,
469 U.S. 325 (1985) 6

Samson v. California,
547 U.S. 843, 848 (2006) 3, 15, 17, 21

United States v. Llera-Plaza,
No. 98-362-10, 2002 WL 27305
(E.D. Pa. Jan. 7, 2002),
rev'd on reconsideration,
188 F. Supp. 2d 549 (E.D. Pa. 2002)..... 15

United States v. McCarty,
648 F.3d 820 (9th Cir. 2011)..... 13

United States v. Robinson,
414 U.S. 218 (1973)..... 13, 16

Williamson v. State,
993 A.2d 626 (Md. 2010)..... 23, 24

Wilson v. Arkansas,
514 U.S. 927 (1995)..... 5

Wyoming v. Houghton,
526 U.S. 295 (1999)..... 5, 18

Zurcher v. Stanford Daily,
436 U.S. 547 (1978)..... 22

Constitutional Provisions

U.S. Const. amend. IV..... 3, 5

Statutes and Regulations

5 U.S.C. § 552a 21

I.R.C. § 6103 21

N.M. Code R. § 10.14.200.7 19

N.M. Code R. § 10.14.200.10 19

N.M. Code R. § 10.14.200.11 19

N.M. Code R. § 10.14.200.12 20
N.M. Stat. Ann. § 29-3-10 ..... 9, 20
N.M. Stat. Ann. § 29-16-2 20
N.M. Stat. Ann. § 29-16-6 9
N.M. Stat. Ann. § 29-16-8 20
N.M. Stat. Ann. § 29-16-10 ..... 19, 20
N.M. Stat. Ann. § 29-16-12 20

Session Laws

1997 N.M. Laws, ch. 105 8
2006 N.M. Laws, ch. 104 ..... 2, 8
2011 N.M. Laws, ch. 84 9

Legislative Materials

Katie Sepich DNA Enhanced Collection Act, H.R. 6104, 112th Cong. (2012) 16

Other Authorities

Deanna Sauceda, *Child Killer Convicted*, Oct. 28, 2011 11

Elizabeth E. Joh, *Reclaiming "Abandoned" DNA: The Fourth Amendment and Genetic Privacy*, 100 Nw. U. L. Rev. 857 (2006) 14

Fed. Bureau of Investigation, *Statement on Brandon Mayfield Case* (May 24, 2004) 14

Katie's Law Helps Win Rape Conviction, Las Cruces Sun-News, Sept. 17, 2011 10

Man Charged with Brutal 2002 Rape,
Las Cruces Sun-News,
Apr. 14, 2006 11

Man Sentenced for Kidnapping & Rape of Clovis Woman,
NewsChannel 10,
Jan. 6, 2012 10

No Arrests a Year After NMSU Student's Death,
Assoc. Press State & Local Wire,
Aug. 29, 2004 11

Renée Ruelas-Venegas,
More Evidence Comes Out in Sepich Murder,
Alamogordo Daily News,
Dec. 23, 2006 8

INTEREST OF *AMICUS CURIAE*[1]

Governor Susana Martinez served as a prosecutor in New Mexico for more than 20 years before being elected Governor. Fourteen of those years were as the elected District Attorney for Doña Ana County in southern New Mexico. As a result of that experience, she is intimately familiar with the need for better law enforcement technologies, especially in cases where justice may otherwise be long denied for victims of sexual abuse, rape, or murder.

In 2006, Governor Martinez prosecuted Gabriel Adrian Avila, who raped and murdered a graduate student named Katie Sepich in 2003. That crime remained unsolved for three years despite intensive investigative efforts. Investigators were able to obtain the perpetrator's DNA from under Sepich's fingernails because she had fought back and scratched him, but no match was found in the DNA database. Avila was identified three years later as Sepich's rapist and murderer only because he was convicted of an unrelated felony and had his DNA collected pursuant to a New Mexico statute allowing DNA collection from convicted felony offenders. But had DNA collection of arrestees been permitted when Avila was arrested for the unrelated felony in 2003, the Sepich family would not have had to wait over

---

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* and her counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner and respondent have each filed blanket consent letters with the Clerk.

three years to see their daughter's killer brought to justice.

This powerful experience prompted Governor Martinez to fight for reforms in New Mexico's DNA collection statute. In 2006, as District Attorney she pressed the Legislature to pass "Katie's Law," which amended the State's DNA collection statute to permit collecting DNA from individuals arrested for certain violent felonies—as does the Maryland law at issue in this case. 2006 N.M. Laws, ch. 104. As part of that effort, she provided information about the Katie Sepich case and what a difference early DNA collection could have made. As Governor, she made it a priority to expand the statute so that the State could obtain DNA samples pursuant to all felony arrests. New Mexico's Legislature enacted such an amendment in 2011, and Governor Martinez signed it into law. This expansion of the New Mexico statute bore immediate fruit: in the year and a half since the amendment, the State has identified and brought to justice numerous violent criminals who otherwise might have escaped identification and victimized more innocent citizens.

Governor Martinez is participating as an *amicus* to urge the Court to reverse the Maryland Court of Appeals and allow the people, through their elected representatives, to better protect themselves against crime by authorizing the collection of DNA from felony arrestees. The people have a strong interest in enabling the State to identify felony arrestees and solve crimes; the DNA collection is entirely non-intrusive; and statutory protections ensure that the State will not misuse the collected DNA to invade

citizens' privacy. Maryland's DNA collection regime, like New Mexico's, is therefore not at all "unreasonable," U.S. Const. amend. IV.

SUMMARY OF ARGUMENT

Collecting and analyzing DNA from individuals arrested for felonies is reasonable under this Court's balancing framework for evaluating the reasonableness of a search. On one side of the scale, the Court weighs the extent to which the search promotes valid state interests; on the other, the Court considers the extent to which the search impinges on citizens' privacy. *See, e.g.*, *Samson v. California*, 547 U.S. 843, 848 (2006). That balance tips heavily here in favor of the State.

On the State's side of the scale, DNA collection is an important tool to identify arrestees and solve crimes. DNA analysis is the most accurate means known to modern science to identify arrestees. States have an obvious interest in using the best technology available, and where the legislature has opted to do so, it is inappropriate for a court to decide that technologies that are undeniably inferior are nonetheless good enough. The court below compounded this error by drawing a sharp distinction between the State's interest in identifying arrestees and its interest in solving crimes. Those interests are closely related, and in any event the validity of DNA analysis as a means of identifying arrestees is not undermined by the fact that DNA analysis is *also* a valuable means of solving crimes. To the contrary, that fact simply underscores that

the interests on the State's side of the scale are extremely weighty.

Given the weight of the State's interests, Maryland's DNA statute can be "unreasonable" only if it substantially impinges on meaningful privacy interests in a manner not justified by its benefits. It does not.

As an initial matter, given that arrestees can be jailed and strip-searched without individualized suspicion, *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012), it is significant that the act of collecting DNA itself is entirely non-intrusive. To be sure, the court below was palpably concerned that the State might *use* collected DNA in ways that would be intrusive and unreasonable. But the Maryland legislature built robust protections into the statute to make the misuse feared by the court below a felony. Not surprisingly, such misuse is also a chimera: there is absolutely no evidence, nor even an allegation, that it has occurred a single time. An important statute enacted by the people's elected representatives to improve the State's ability to keep its citizens safe from crime should not be struck down based on the hypothetical concern that some state official somewhere might commit a felony and invade a citizen's privacy in violation of the statute's explicit restrictions.

The Court of Appeals' other reasons for striking down the statute do not withstand scrutiny. The court's concern with the "warrantless" nature of the DNA collection is misplaced, because the statute specifies exactly when and how to collect and analyze DNA and leaves no discretion to law enforcement

officers. As a result, requiring a warrant would add no meaningful protection. Moreover, the court's concern over warrants is difficult to square with its recognition that law enforcement officers can obtain arrestees' DNA on an ad hoc and warrantless basis through trickery, such as offering an arrestee a drink and then surreptitiously obtaining his DNA from the rim of the cup. The State's carefully crafted statute, replete with protections against misuse and guarantees of regularity, is surely far preferable to such a regime. Finally, the court erred in its belief that collecting DNA from arrestees contravenes the presumption of innocence. That presumption is a trial right and has nothing to do with the Fourth Amendment reasonableness of DNA collection. Arrestees who are prosecuted based on a DNA match retain the full panoply of trial rights, including the right to confront the State's DNA analyst to ensure that the match is valid and persuasive.

ARGUMENT

The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. The Amendment's requirement of reasonableness is "flexible" and "should not be read to mandate . . . rigid rule[s]." *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995). "In determining whether a particular governmental action violates this provision," this Court "assess[es], on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999). "[W]hat is reasonable depends on the context within

which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires balancing the need to search against the invasion which the search entails." *New Jersey v. TLO*, 469 U.S. 325, 337 (1985) (internal quotation marks omitted). When this well-established framework is applied to the Maryland DNA collection statute at issue here, the balance tips sharply in favor of the State. Collecting DNA from individuals arrested for felonies significantly advances important government interests, and does so with a minimum of intrusion into citizens' reasonable privacy interests.

I. The State Has a Strong Interest in Obtaining DNA from Felony Arrestees.

Collecting DNA at arrest helps the State do its most critical job: protecting its citizens. DNA collection from felony arrestees solves more crimes, by leading to the identification of dangerous criminals sooner, more efficiently, and more reliably. It enables law enforcement to solve the toughest crimes—cold cases that have languished for years. And equally important, DNA collection exonerates the innocent. That DNA collection provides such valuable benefits to the State's ability to identify and convict the guilty and to identify and exonerate the innocent is a strong point in favor of the constitutionality—the "reasonableness"—of the Maryland statute.

The court below, however, appeared to believe that the existence of these law enforcement benefits somehow undermines the State's interest in identifying the individuals who are in its custody.

That makes no sense. The State's interest in identifying those in its custody is valid and important, and using the best technology available furthers that interest. That DNA collection *also* helps solve crimes, as well as helping identify individuals in custody, makes DNA collection more important—not less "reasonable."

A. Collecting DNA From Felony Arrestees Helps States Solve Serious Crimes.

The story behind New Mexico's law, and similar laws around the country, is a compelling illustration of the power of DNA evidence. Katie Sepich was a 22-year-old student from Carlsbad, New Mexico working on a master's degree in business at New Mexico State University in Las Cruces in 2003. She was walking home when someone attacked her. The attacker raped her as she fought back, scratching him repeatedly and coming away with his DNA under her fingernails. The rapist then strangled her, took her half-naked body in his truck to an old city dump in the desert, doused her body with alcohol, and set it on fire in an attempt to destroy the physical evidence of his crime. The police investigated everyone connected to Sepich but had no leads.

Less than three months later, Gabriel Adrian Avila was arrested for entering the home of two other young women, who locked themselves in a bedroom and called the police. He was charged with aggravated burglary with intent to commit aggravated assault. At that time, New Mexico law provided for DNA collection only upon conviction, so Avila's DNA could not be collected upon his arrest.

See 1997 N.M. Laws, ch. 105. If the State could have collected and analyzed Avila's DNA at that point, the Sepich family would not have had to wait over three years to bring their daughter's rapist and murderer to justice. Nor, presumably, would Avila have been released on bail. As it happens, without the benefit of that information, Avila was granted bail and jumped it, eluding rearrest for over a year. It is not known whether Avila victimized other young women during that time. He eventually was convicted of the burglary charge and sentenced to nine years' imprisonment, and only then was his DNA collected pursuant to the New Mexico statute. Renée Ruelas-Venegas, *More Evidence Comes Out in Sepich Murder*, Alamogordo Daily News, Dec. 23, 2006.

When the DNA sample that Avila provided upon conviction was analyzed, it matched the DNA found under Katie Sepich's fingernails. As District Attorney of Doña Ana County, Governor Martinez confronted Avila with the DNA match, and he confessed to raping and murdering Sepich. Avila pled guilty to first-degree murder and was sentenced to 69 years in prison in 2007.

Meanwhile, in March 2006, New Mexico had passed an amendment to its DNA Collection Law to allow for the collection of DNA samples from persons arrested for violent felonies. 2006 N.M. Laws, ch. 104. This amendment was known as "Katie's Law" in memory of Katie Sepich. As District Attorney, Governor Martinez fought for the 2006 amendment, and it was an important advance. But the statute still did not permit collecting DNA from persons arrested for crimes that are non-violent but

nonetheless are serious enough to be felonies. Many individuals who are arrested for non-violent felonies also have committed or will commit violent felonies, so this gap in protection was significant.

Accordingly, when she took office in 2011, Governor Martinez made it her priority, starting on her very first day, to expand Katie's Law to cover all adults arrested for a felony. This amendment passed by a vote of 55-13 in the House and 35-3 in the Senate. Governor Martinez signed the amendment into law and it took effect July 1, 2011. 2011 N.M. Laws, ch. 84.

Under current New Mexico law, anyone 18 years of age or older who is arrested for the commission of a felony must provide a DNA sample. N.M. Stat. Ann. § 29-16-6(B). The sample is sent to a lab, but the lab may not analyze it until there has been a judicial determination that probable cause existed for the arrest. *Id.* § 29-3-10(B). If at arraignment the court determines that probable cause is lacking, the sample must be destroyed without ever being tested. *Id.* (If the defendant fails to appear, the lab may retain and analyze the sample. *Id.*)

New Mexico has seen a significant rise in DNA matches due to Katie's Law and the reform of Katie's Law that Governor Martinez spearheaded. As of December 2012, 958 DNA samples had been matched to arrestee profiles in the five years since Katie's Law took effect in 2007. This represents a dramatic increase in the State's ability to solve serious crimes; the nine years between the initial 1997 enactment (which allowed for DNA collection upon conviction) and Katie's Law yielded only 358 matches. Of the

958 post-Katie's Law matches, 139 were made after the 2011 amendment took effect, including 62 that resulted from arrests for felonies that had not been classified as violent felonies under the 2007 version of the law. In other words, 62 unsolved crimes—including 11 homicide and rape cases—were solved just in the past year and a half, and just in New Mexico, thanks to the 2011 expansion of Katie's Law.

Behind these DNA-match statistics are dangerous criminals who are in prison where they belong when they might otherwise be at large, and crime victims who have gained the security of seeing their attackers brought to justice.

For example, a woman was at home with her four-year-old daughter when a stranger who claimed to be friends with her father asked to be let in to use the bathroom. She allowed him in, and he repaid her by sexually assaulting her at gunpoint. Investigators were able to find the assailant, Jesus Oscar Dominguez, because his DNA was in the system due to prior arrests for illegal reentry. *See Katie's Law Helps Win Rape Conviction*, Las Cruces Sun-News, Sept. 17, 2011. Thanks to DNA testing, Dominguez is serving a 27-year sentence instead of potentially remaining at large and attacking other innocent citizens. *Man Sentenced for Kidnapping & Rape of Clovis Woman*, NewsChannel 10, Jan. 6, 2012, http://www.newschannel10.com/story/16465817/man-sentenced-for-kidnapping-rape-of-clovis-woman. In a similar situation, the 2002 rape of a 41-year-old woman who had pulled over to change a flat tire was solved in 2006 when DNA was collected from a convicted felon, Noel Manuel Sanchez, but the crime

could have been solved four years earlier if Katie's Law had been in force. *Man Charged with Brutal 2002 Rape*, Las Cruces Sun-News, Apr. 14, 2006.

Equally importantly, DNA collection has helped exonerate the innocent, such as in the case of a mentally challenged man who had confessed, falsely, to the rape and murder of an 11-year-old girl in Albuquerque. The true killer was found when his DNA was collected upon arrest for an unrelated burglary. Deanna Sauceda, *Child Killer Convicted*, Oct. 28, 2011, http://www.krqe.com/dpp/news/crime/child-killer-convicted-ds. Indeed, in Katie Sepich's case itself, numerous individuals were publicly identified as potential suspects before DNA testing led the State to the real killer. *See No Arrests a Year After NMSU Student's Death*, Assoc. Press State & Local Wire, Aug. 29, 2004.

B. DNA Collection Also Helps States Identify Arrestees.

While the foregoing makes it clear that New Mexico's DNA collection statute, like Maryland's, is a powerful tool to help the State protect its citizens by solving crimes, DNA collection also furthers the State's interest in identifying persons who are in its custody. The court below drew a sharp distinction between a State's interest in identifying arrestees and its interest in solving other crimes, JA 146–48, but this dichotomy between identification and investigation is a false one.

1. The State's Interest in Solving Crimes Does Not Undermine Its Collection of DNA for Identification Purposes.

As an initial matter, identification and investigation are related because the State needs to know more about an arrestee than just his name before it can responsibly determine how to proceed—for example, what charge or charges to pursue, whether to support or oppose bail, and what other jurisdictions to consult. The court below thus erred by assuming that determining whether an arrestee has committed other crimes can be sharply distinguished from ascertaining his identity. JA 147.

More fundamentally, however, the court below erred by treating the existence of broader or additional investigative benefits as defeating the State's interest in identifying arrestees. The Fourth Amendment requires that a search be reasonable. If it is, the State may use the fruits of that search for any lawful purpose; the Fourth Amendment does not limit the State to using only the fruits that are somehow connected to the original justifications for the search.

For example, a search of an arrestee's person incident to arrest is reasonable because the arresting officers need to know whether he is concealing a weapon, and also need to prevent him from destroying evidence that could easily be destroyed. *See, e.g.*, *Maryland v. Buie*, 494 U.S. 325, 332 (1990); *Chimel v. California*, 395 U.S. 752, 762–63 (1969). But if the officers find other kinds of evidence, the Fourth Amendment does not require them to ignore it. In *United States v. Robinson*, for example, the

arrestee was suspected of driving after his license had been revoked. 414 U.S. 218, 220 (1973). The arresting officer did not have an individualized suspicion that either weapons or evidence pertaining to that crime would be found on the arrestee, but the Court had no trouble concluding that the search incident to arrest was reasonable under the Fourth Amendment and that the heroin found during that search was admissible in a subsequent prosecution. *Id.* at 223, 235–37 & n.7. Similarly, searches of airline passengers that are far more intrusive than the DNA collection at issue here are justified by the "goal of searching for possible safety threats related to explosives," *United States v. McCarty*, 648 F.3d 820, 831 (9th Cir. 2011), but if such a search uncovers evidence of an unrelated offense—child pornography, for example—the government is free to use that evidence, *id.* at 831 n.14.

2. DNA Collection Is a Valuable Means of Identifying Arrestees.

That a State has a legitimate interest in identifying people who are in its custody is undeniable. *See* Pet. Br. 18–19 (citing *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177 (2004)); *cf. Illinois v. Lafayette*, 462 U.S. 640, 646 (1983) (plurality opinion) (warrantless inventory search of arrestee's property justified in part because the "inspection of an arrestee's personal property may assist the police in ascertaining or verifying his identity"). The court below was wrong to hold that the State must be relegated to less effective means of identification such as fingerprinting and ID cards. JA 148.

Under the Court of Appeals' logic, a State could never harness new or updated technology so long as the existing technology is, in the court's estimation, good enough. But history belies that proposition. Before fingerprinting, arrestees were still required to provide information enabling the State to identify them as accurately as possible using the tools available at the time; fingerprinting simply gave the government a more efficient and more reliable way of verifying the arrestee's identity than relying on photographs or identification documents. *See* Elizabeth E. Joh, *Reclaiming "Abandoned" DNA: The Fourth Amendment and Genetic Privacy*, 100 Nw. U. L. Rev. 857, 869 & n.66 (2006) . DNA, in this sense, is just the latest step in the evolution of identification technology: it serves the same identification purpose as fingerprinting, but it is more accurate. Pet. Br. 8, 19 n.6 (explaining that the justifications for pre-fingerprinting methods of ascertaining identity apply equally to fingerprinting and DNA collection).

To be clear, fingerprint analysis is scientifically valid and an important law enforcement tool. But there is no denying that DNA is more accurate. Defendants regularly challenge fingerprint evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and similar state-law standards, and the government has been known to make critical errors in matching fingerprints. For example, the FBI mistakenly matched a latent print linked with the 2004 Madrid train bombings to an innocent Oregon attorney. *See* Fed. Bureau of Investigation, *Statement on Brandon Mayfield Case* (May 24, 2004), http://www.fbi.gov/news/pressrel/press-releases/statement-on-brandon-mayfield-case.

Even though such errors are infrequent and challenges to fingerprint evidence rarely succeed,[2] the point is that States need more, and more effective, tools to be able to protect their citizens. When superior technology like DNA analysis is available, there is no justification for a court to relegate the State to lesser technology. *Samson v. California*, 547 U.S. 843, 854 (2006) ("[T]he Fourth Amendment does not render the States powerless to address [their] concerns *effectively*.").

The court below appears to have believed that fingerprints and photographs are good enough, or at least were good enough in the case of Mr. King. JA 85 (stating that Maryland "identified King accurately and confidently through photographs and fingerprints" and "had no legitimate need for a DNA sample in order to be confident who it arrested"). But it is a legislative judgment for the people to make through their elected representatives whether the State should be content with "good enough" technology or should strive for better. The legislatures of New Mexico, Maryland, and many other States have decided that the State should use state-of-the-art technology to identify arrestees, and absent any serious harm to constitutional values, *see*

---

[2] Only one court appears to have found that fingerprint evidence does not meet the *Daubert* standard—only to reverse itself on reconsideration. *United States v. Llera-Plaza*, No. 98-362-10, 2002 WL 27305 (E.D. Pa. Jan. 7, 2002), *rev'd on reconsideration*, 188 F. Supp. 2d 549 (E.D. Pa. 2002).

infra Part II, the Court should defer to that presumptively valid legislative judgment.[3]

Crucially, moreover, the court below had no basis to require the State to prove that DNA was necessary to identify the arrestee in *this particular case*. *See* JA 85. DNA collection furthers the State's interest in identification as a general matter, which makes collection reasonable given its non-intrusiveness. By analogy, a search incident to arrest is *always* reasonable if it is limited to areas that the arrestee can reach to obtain a weapon or destroy evidence; a court does not ask whether in that particular instance the police could have used other methods to ascertain that the arrestee was not armed or whether there was really enough of a risk that a particular arrestee would destroy evidence. *Robinson*, 414 U.S. at 235 ("[O]ur more fundamental disagreement with the Court of Appeals arises from its suggestion that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest.").

There are also good reasons why such categorical legislative judgments are preferable to the alternative of case-by-case judgments made by law enforcement personnel. Where a legislature has prescribed uniform use of DNA testing in a given

---

[3] On December 28, 2012, Congress passed the Katie Sepich DNA Enhanced Collection Act, which makes federal funds available to help States collect DNA from felony arrestees. H.R. 6104, 112th Cong. (2012). The Act awaits President Obama's signature.

category of cases, it has ensured consistency by constraining the discretion of law enforcement. Such legislative requirements protect against the discrimination and arbitrariness, real or alleged, that can result from allowing law enforcement to decide on a case-by-case basis whether DNA testing is "really" needed for a particular arrestee.

This case is thus easier than *Samson*, where the State had broadly authorized parole officers to search parolees without individualized suspicion or a warrant, but left it to individual parole officers to decide when and how to exercise that broad discretion. 547 U.S. at 846. The Court upheld the State's categorical authorization for such searches despite the dissent's concern that this system subjected parolees "to capricious searches conducted at the unchecked 'whim' of law enforcement officers," because the State's prohibition on "arbitrary, capricious or harassing" searches provided sufficient assurance that this broad authority would be exercised appropriately. *Id.* at 856. Here, the State's detailed legislative scheme takes this concern off the table entirely by mandating DNA collection and analysis for felony arrestees and leaving little or no discretion in the hands of individual law enforcement officers. *See also infra* at 22–23.

II. The Cost to Constitutional Values Is Minimal.

The court below did not question the public safety and law enforcement benefits of collecting and analyzing DNA from felony arrestees. Instead, the court struck down Maryland's DNA collection statute because it viewed the cost to constitutional values as too high. To be sure, the mere fact that a technique

benefits law enforcement does not make it constitutional. *Delaware v. Prouse*, 440 U.S. 648, 658–59 (1979). But where a technique benefits law enforcement—meaning that it benefits innocent citizens by helping the State identify and convict the guilty while also identifying and exonerating the innocent—it should pass muster as "reasonable" unless it impinges substantially on citizens' rights. *Cf. Houghton*, 526 U.S. at 299–300. Put differently, arrestees can have no valid interest in depriving the State of the benefits of a new technology and relegating the State a less effective means of identification if the new technology is no more intrusive than the old.

That is the case here. The collection of the DNA is entirely non-intrusive, involving only a cheek swab that causes no pain and little or no invasion of privacy. *Cf. Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012) (upholding routine strip searches of arrestees detained in general prison population despite the substantial invasion of privacy entailed by such searches). The court below evidently believed that the State could not be trusted with the "vast genetic treasure map" contained in arrestees' DNA. JA 143. But the court's mistrust is unwarranted, and its analysis cannot withstand scrutiny. In truth, Maryland's statute, like New Mexico's, contains myriad strong protections against the kind of misuse of collected DNA that so worried the court below.

A. The Statute Protects Arrestees' Privacy Because It Contains Myriad Safeguards.

The procedural safeguards in DNA collection laws ensure that the nightmare conjured by the lower court will remain far from the realm of reality. First, the laws limit the analysis of DNA to strands that serve *only* to identify an arrestee. As required to participate in CODIS (the federal DNA database), New Mexico and Maryland restrict DNA analysis to the "core loci," which are 13 strands chosen precisely because they are statistically unique to each individual but do not reveal sensitive genetic information. N.M. Code R. §§ 10.14.200.7(G), 10.14.200.10(F), 10.14.200.11(G)(2); *see also* Pet. Br. 16. Analysts searching for a DNA match thus do not, and cannot, rummage around in an arrestee's genes and discover sensitive information about him any more than fingerprint analysts searching for a print match can do so. Just like a fingerprint, DNA from the core loci can identify an individual, but does not reveal sensitive personal information about the individual.

Expungement is an additional protection built into the statute. An arrestee's DNA sample will be expunged from federal and state databases at his request if the arrest does not lead to a conviction either for the offense of the arrest or another offense as a result of a DNA match. N.M. Stat. Ann. § 29-16-10(A).[4] Expungement also occurs if no felony charge

---

[4] "[E]xpungement means the complete destruction of all samples, records, personal identification and information concerning that person, such that the person could not be re-

has been filed within a year of the arrest. *Id.* § 29-16-10(B)(3)(b).[5] Because of this robust expungement mechanism, the Maryland court's belief that DNA collection is improper because arrestees are presumed innocent (JA 141, 144–45) is misplaced; if an arrestee is not ultimately convicted, his sample is expunged.

Furthermore, procedural safeguards exist against the misuse of DNA in every state, including New Mexico. The DNA Identification Act strictly limits the uses of those samples to three authorized purposes: identifying persons in connection with criminal investigations, establishing a missing persons database, and identifying unknown human remains. N.M. Stat. Ann. §§ 29-3-10(C), 29-16-2, 29-16-8. Violation of these restrictions is a felony. *Id.* § 29-16-12(A), (B). Despite the court's suggestion that it was all that stood between citizens and the State's "plundering [of] the vast genetic treasure map" of their DNA, *see* JA 161 (Barbera, J., dissenting), there is absolutely no claim that such misuse occurs in practice or indeed has *ever* occurred. The fears of the court below thus are entirely hypothetical.

The Court of Appeals believed that the theoretical possibility of misuse of DNA information was sufficient to render the entire statutory scheme

---

associated with the expunged materials." N.M. Code R. § 10.14.200.12(N).

[5] Maryland's statute provides for automatic expungement, while New Mexico's requires the arrestee to initiate the process. N.M. Stat. Ann. § 29-16-10(A); Pet. Br. at 18 n.5.

unconstitutional. But courts are supposed to presume that government officials behave lawfully—not hypothesize rampant felonious "plundering" contrary to explicit statutory mandates. *NARA v. Favish*, 541 U.S. 157, 174 (2004); *see also Samson*, 547 U.S. at 855–57 (procedural safeguards against capricious or harassing searches are sufficient to allay concerns about how parole officers might exercise broad authority to conduct suspicionless searches of parolees).

By analogy, consider the vast store of sensitive and personal information that federal agencies such as the Internal Revenue Service and the Social Security Administration have collected about citizens pursuant to statutory mandates. If federal agencies were to share all that information with the FBI so that it was linked to the FBI's fingerprint database, perhaps one could argue that the FBI's collection of fingerprints could threaten the kind of invasion of privacy that the court below feared. But federal law, including the Privacy Act of 1974, bars such sharing of sensitive personal information. 5 U.S.C. § 552a(b); *see also* I.R.C. § 6103(a) (protecting the confidentiality of tax returns). As a result, the possibility that federal officials could hypothetically violate federal law and share and use citizens' personal information in prohibited ways is not a serious objection to the government's collection of that information. The Court of Appeals' approach—ignore the law and assume the worst—is fundamentally inappropriate.

It is almost as if the court below believed that the need for the statutory protections against misuse

of DNA information proves the unreasonableness of the statute, but that is backwards: these protections may well be necessary to ensure that DNA collection and analysis comports with the Fourth Amendment, but the point is that they are present and so that need has been satisfied. The Court should consider the reasonableness of collecting DNA from arrestees given the existence of these protections—in other words, consider the statute as an integrated whole as it actually exists and not, like the court below, hypothesize away the limits and protections that the legislature carefully and responsibly built into the statute.

B. The Court Below's Concerns Are Unfounded.

The court below expressed other concerns with allowing the State to collect DNA from arrestees, but none of them is persuasive.

1. The "Warrantless" Nature of the Search Is Irrelevant Because the Statute Fulfills the Same Purpose Served by Requiring a Warrant.

The Court of Appeals repeatedly criticized the "warrantless" nature of the DNA collection. JA 140, 141, 142, 147, 149. But this is a red herring. The legislature has enacted a generally applicable statute that mandates DNA collection and testing in certain categories of cases. A principal purpose of the warrant requirement is to limit individual officers' discretion concerning what searches to conduct, *see Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978), but the statute here avoids the problem entirely by

telling state officials exactly when and how to collect and analyze DNA. By supplying objective rules, the statute ensures that DNA collection and analysis occurs in a consistent manner that is the polar opposite of the "unbridled discretion of law enforcement officials" that raises serious Fourth Amendment concerns. *Prouse*, 440 U.S. at 661; *cf. Camara v. Municipal Court*, 387 U.S. 523, 532–33 (1967) (striking down an ordinance whose "practical effect" was "to leave the occupant subject to the discretion of the official in the field" because "[t]his is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search"). Because state officials' discretion is "directly curtailed by the [statutory] scheme," "it is difficult to see what additional protection a warrant requirement would provide." *Donovan v. Dewey*, 452 U.S. 594, 605 (1981).

Puzzlingly, even as the Court of Appeals emphasized its concern that DNA collection under the statute is "warrantless," the court seemingly approved of law enforcement gathering DNA from arrestees through trickery (and without a warrant). The court discussed with apparent approval its prior decision in *Williamson v. State*, 993 A.2d 626 (Md. 2010), in which police suspected Williamson of unsolved rapes, gave him a McDonald's meal after arresting him on an unrelated charge, and then obtained his DNA surreptitiously from the drink cup he left behind in the interrogation room. *See id.* at 630; JA 108–10. Williamson's DNA matched the specimens obtained from the unsolved rapes, and he was indicted for them. The court below upheld the

DNA collection and analysis on the ground that Williamson had abandoned the cup. 993 A.2d at 635.

Without questioning that result, it is hard to understand why it is preferable, either as a constitutional matter or a policy matter, for a State to encourage its law enforcement officers to use trickery to obtain DNA samples from suspects in ad hoc ways rather than to allow state legislatures to implement orderly systems to collect DNA in a professional and consistent manner. For all its professed concern with suspects' privacy rights and the warrantless nature of the DNA collection in this case, the court essentially invited the police to reach the same place via a much more circuitous and underhanded route.

Indeed, the court treated the tactics used in *Williamson* as a matter of amusement, speculating that if Williamson was given "a McDonald's Extra Value Meal . . . it appears that the State received the 'extra value,' not Williamson." JA 109 n.18. Without suggesting that the tactics used in *Williamson* are improper, it is no laughing matter for a court to encourage law enforcement to rely on deceit and ad hoc tactics while throwing out the orderly scheme, complete with robust protections against misuse, crafted by the people's elected representatives. Nor, of course, is it a laughing matter to let a rapist back on the streets, which would be the practical result of the decision below.

2. Collecting DNA from Arrestees Does Not Prejudice Their Trial Rights.

The lower court also erred in suggesting that DNA collection undermines the "presumption of innocence" "enjoyed" by arrestees. JA 141, 144–45. As explained by petitioner, *see* Pet. Br. 20–21, the presumption of innocence is a trial right, not a Fourth Amendment right, and accordingly has no application to searches of arrestees. DNA collection at arrest does not in any way prejudice the arrestee's right to be acquitted unless his guilt is proven beyond a reasonable doubt in accordance with all the rules, constitutional and otherwise, that govern the trial process.

In particular, under this Court's recent precedents, *e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), DNA evidence is fully subject to challenge at trial. Collection of DNA at arrest does not undermine the defendant's ability to confront the relevant laboratory analyst at trial and to ensure, through cross-examination as well as proffering evidence of the defendant's own, that the prosecution's DNA evidence is scientifically valid and persuasive. To the extent that the court below meant to suggest that DNA evidence will often be compelling and that few defendants will succeed in discrediting DNA evidence against them, that is a testament to the value and importance of collecting DNA, not a valid objection to doing so.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below.

Respectfully submitted,

JEFFREY S. BUCHOLTZ
Counsel of Record
KAREN GROHMAN
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, DC 20006
(202) 737-0500
jbucholtz@kslaw.com

JESSICA M. HERNANDEZ
MATTHEW J. STACKPOLE
STEVEN E. BLANKINSHIP
OFFICE OF THE GOVERNOR
490 Old Santa Fe Trail #400
Santa Fe, NM 87401
(505) 476-2200

Counsel for Susana Martinez, Governor of the State of New Mexico

January 2, 2013

AMICUS CURIAE BRIEF

No. 12-207

Supreme Court, U.S.
FILED
JAN 2 _ 2013
OF THE CLERK

In the
Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

ALONZO JAY KING, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF OF MARYLAND CHIEFS OF POLICE ASSOCIATION, INC., MARYLAND SHERIFFS' ASSOCIATION, INC., POLICE CHIEFS' ASSOCIATION OF PRINCE GEORGE'S COUNTY, MARYLAND, INC., MARYLAND MUNICIPAL LEAGUE, INC., POLICE EXECUTIVE ASSOCIATION, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., MAJOR CITIES CHIEFS ASSOCIATION, MAYOR AND CITY COUNCIL OF BALTIMORE AND MONTGOMERY COUNTY, MARYLAND AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Karen J. Kruger
Counsel of Record
FUNK & BOLTON, P.A.
Twelfth Floor
36 South Charles St.
Baltimore, MD 21201
410.659.7700
kkruger@fblaw.com

Counsel for Amici Curiae

(Please see reverse for additional counsel)

GibsonMoore Appellate Services, LLC • 421 East Franklin Street, Suite 230
Richmond, VA 23219 • 804-249-7770 • www.gibsonmoore.net

Of Counsel
George Nilson
City Solicitor
Suzanne Sangree
Chief Solicitor
CITY OF BALTIMORE
DEPARTMENT OF LAW
100 N. Holliday St.
Room 109
Baltimore, MD 21202
410.396.3249
suzanne.sangree@
Baltimorecity.gov

Attorneys for Mayor and City Council of Baltimore

Marc P. Hansen
County Attorney
Sarah Daken
Assoc. County Attorney
100 Edison Park Drive
Gaithersburg, MD 20878
240.777.6740
sarah.daken@montgomery
countymd.gov

Attorneys for Montgomery County, Maryland

Gene Voegtlin, Esq.
INTERNATIONAL ASSOCIATION
OF CHIEFS OF POLICE, INC.
515 N. Washington St.
Alexandria, VA 22312
703.836.6767
voegtlin@theiacp.org

Attorney for International Association of Chiefs of Police, Inc.

Jacqueline Daley, Esq.
MAJOR CITIES
CHIEFS ASSOCIATION
315 East 200 South
Salt Lake City, UT 84111
215.685.8777
jacqueline.daley@phila.gov

Attorney for Major Cities Chiefs Association

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

STATEMENT OF THE CASE 4

INTRODUCTION AND SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. THE GOVERNMENT HAS WEIGHTY INTERESTS IN THE PROMPT IDENTIFICATION AND PROSECUTION OF PERPETRATORS OF CRIME AND THE EXONERATION OF THE INNOCENT 9

II. THE PRIVACY INTERESTS OF ANY ARRESTEE ARE MINIMAL AND THE NON-INVASIVE METHOD USED TO TAKE A DNA SAMPLE IS NOT OFFENSIVE TO THE FOURTH AMENDMENT 16

A. An Arrestee Has No Significant Privacy Interest In Maintaining Anonymity Or Preventing Discovery Of Other Crimes He Has Committed 16

B. If It Is A Search, The Taking Of A DNA Sample Is A Reasonable Search Sanctioned By The Doctrine Of Search Incident To Arrest 18

C. The Taking Of A DNA Sample Upon Arrest Is Not A Search Within The Meaning Of The Fourth Amendment 22

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

CASES

Anderson v. Commonwealth,
650 S.E.2d 702 (Va. 2007) 10, 17

Arizona v. Gant,
556 U.S. 332 (2009) 19

Bell v. Wolfish,
441 U.S. 520 (1979) 7, 9

Boroian v. Mueller,
616 F. 3d 60 (1st Cir. 2010) 4, 8, 23

Chimel v. California,
395 U.S. 752 (1969) 19

Cupp v. Murphy,
412 U.S. 291 (1973) 20

Davis v. United States,
__ U.S. __, 131 S. Ct. 2419 (2011) 5

Dist. Attorney's Office v. Osburne,
557 U.S. 52 (2009) 9

Elkins v. United States,
364 U.S. 206 (1960) 19

Florence v. Board of Chosen Freeholders of the County of Burlington, ___ U.S. ___,
132 S. Ct. 1510 (2012) 10, 18

Haskell v. Harris,
669 F. 3d 1049 (9th Cir. 2012) 10

Hiibel v. Sixth Judicial Dist. Court,
542 U.S. 177 (2004) 11, 17

Illinois v. Krull,
480 U.S. 340 (1987) 5

Illinois v. Lafayette,
462 U.S. 640 (1983) 21

Jones v. Murray,
962 F.2d 302 (4th Cir. 1992) 10, 17

Katz v. United States,
389 U.S. 347 (1967) 22

King v. State of Maryland,
42 A.3d 549 (Md. 2012) 16, 18

Knowles v. Iowa,
525 U.S. 113 (1998) 19

Michigan v. DeFillippo,
443 U.S. 31 (1979) 16, 21

Rakas v. Illinois,
439 U.S. 128 (1978) 17

Raynor v. State,
29 A.3d 617 (Md. App. 2011) 24

Samson v. California,
547 U.S. 843 (2006) 7, 9

Schmerber v. California,
384 U.S. 757 (1966) 22

Skinner v. Ry. Labor Executives' Ass'n,
489 U.S. 602 (1989) 7, 8, 22

United States v. Davis,
690 F.3d 226 (4th Cir. 2012) 10, 13, 22

United States v. Edwards,
415 U.S. 800 (1974) 19, 20

United States v. Kincade,
379 F.3d 813 (9th Cir. 2004) 12

United States v. Knights,
534 U.S. 112 (2001) 7, 8

United States v. Leon,
468 U.S. 897 (1984) 5

United States v. Mitchell,
652 F.3d 387 (3d Cir. 2011) 4, 10, 11, 17

United States v. Pope,
686 F.3d 1078 (9th Cir. 2012) 21

United States v. Robinson,
414 U.S. 218 (1973) ..... *passim*

Virginia v. Moore,
553 U.S. 164 (2008) 21, 24

Weeks v. United States,
232 U.S. 383 (1914) 19

Winslow v. Smith,
696 F.3d 716 (8th Cir. 2012) 16

CONSTITUTIONAL PROVISION

U.S. Const. amend. IV ..... *passim*

STATUTES AND REGULATIONS

Fla. Stat. Ann. § 943.325(1)(a)
(LexisNexis 2012) 9

Md. Code Ann. § 2-504
(LexisNexis 2011 Repl. Vol.) 4

Va. Code § 19.2-310 (LexisNexis 2012) 9

BOOKS

Bartlett's Familiar Quotations
(16th ed. 1992) 11

INTERNET RESOURCES

http://www.innocenceproject.org/
Content/Facts_on_Postconviction_
DNA_Exonerations.php 15

NEWSPAPERS AND PERIODICALS

Spencer S. Hsu, *After Lengthy Prison Term, D.C. Man is Exonerated*,
Wash. Post, Dec. 19, 2012 14

Justin Jouvenal, *Arrest in 2010 Va. Killing Came After Hope Almost Gone*,
Wash. Post, Dec. 15, 2012 12

Justin Jouvenal, *Fingerprint Match Led to Suspect in 2010 Slaying*, Wash. Post, Dec. 19, 2012 12

Walter A. McNeil, *President's Message: Our Recommitment to Addressing Wrongful Convictions*, The Police Chief, June 2012 ..... 13, 14

Dan Morse, *After 15 Years in Prison, Montgomery Man Is Cleared Of Murder*, Wash. Post, Oct. 31, 2010 14

Michael D. Ranalli, *Wrongful Convictions and Officer Safety: Shifting the Focus to the Process*, The Police Chief, Jan. 2012 ..... 12, 13

Frederick N. Rasmussen, *Judge S. Ann Brobst, Longtime Baltimore County Prosecutor*, Balt. Sun, Dec. 19, 2012 15

Yvonne Wenger, *DNA Call Could Undo Rape Case*, Balt. Sun, June 10, 2012 13

Matt Zapotosky, *DNA Results Exonerate Two Teens in Rape Case*, Wash. Post, June 30, 2012 14

INTEREST OF THE *AMICI CURIAE*[1]

Maryland Chiefs of Police Association, Inc., Maryland Sheriffs' Association, Inc. ("MSA"), Police Chiefs' Association of Prince George's County, Maryland, Inc., Maryland Municipal League, Inc. Police Executive Association, the International Association of Chiefs of Police ("IACP"), and Major Cities Chiefs Association ("MCC"), along with the Mayor and City Council of Baltimore ("City of Baltimore" or "City") and Montgomery County, Maryland write in support of the Petitioner, State of Maryland.

The Maryland law enforcement associations are non-governmental business associations that represent professional law enforcement officers with a membership of more than 350 chiefs of police, sheriffs, other law enforcement members, directors of private security entities, and interested parties in related professions. Within their collective membership, most of the 130 law enforcement agencies in Maryland are represented. MSA also separately represents the State's elected sheriffs, who, in addition to standard law enforcement services, are responsible for maintaining county detention centers and correctional facilities.

---

[1] The parties have consented to the filing of this brief and letters of consent have been filed with the Clerk, pursuant to Rule 37.2 of the Supreme Court of the United States. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

IACP is the premier organization of police executives and front-line officers in the world. Founded in 1893, IACP, with more than 21,000 members in 101 countries, is the world's oldest and largest association of police executives. IACP's mission, throughout the history of the association, has been to identify, address, and provide solutions for urgent law enforcement issues.

IACP represents the interests of law enforcement agencies at the state and local levels. Association members include law enforcement officers and law enforcement administrators who are charged with the responsibility of protecting citizens from criminals, both nationally and internationally.

MCC is a professional association of Police Chiefs and Sheriffs representing the largest cities in the United States and Canada. MCC membership is comprised of Chiefs and Sheriffs of the sixty-three largest law enforcement agencies in the United States and seven largest in Canada. Its members serve over 76.5 million people (68 US - 8.5 Canada) with a sworn workforce of 177,150 (159,300 US, 17,850 Canada) officers and non-sworn personnel. MCC provides a forum for law enforcement executives to share ideas, experiences and strategies for addressing the challenges of policing large urban communities. Additionally, MCC works to influence national public policy on law enforcement matters; enhance the development of current and future leaders; and encourage and sponsor research to improve law enforcement practices.

These associations support law enforcement officers by providing opportunities for training, networking, strategic planning, advocacy, and mutual support to better serve and protect the citizens in the communities they serve.

City of Baltimore is the largest (by population) municipal corporation in the State of Maryland. As an urban center, the City faces tremendous criminal justice challenges and relies heavily on innovative policing methods and investigative techniques to maintain public safety. Resolving sexual assault investigations, appropriately charging and convicting sexual perpetrators, and ultimately deterring sexual assaults are all high priorities of Mayor Stephanie Rawlings-Blake and the use of DNA science is a critical tool for achieving those priorities.

Montgomery County, Maryland shares a geographic border with Washington, D.C., the nation's capital. Within the highly-populated and highly diverse county are many federal employers, employees, and residents who demand a high level of efficiency and effectiveness in the County police force. The police force must and does use all appropriate law enforcement mechanisms to maintain public safety in Montgomery County.

Amici address the Court on behalf of the law enforcement community and local governments to urge that the decision of the Court of Appeals of Maryland be reversed, and that Mr. King's conviction be reinstated. The collection of DNA from individuals who have been arrested is a critical and effective modern tool that assists law enforcement in solving crimes, identifying perpetrators, eliminating

errors, and helping to protect local communities. The Court of Appeals of Maryland failed to adequately recognize these vital governmental interests.

Amici are in a position to assist the Court in this case because its importance is not limited to the parties. The outcome of the case will affect all law enforcement agencies and localities not only in Maryland, but across the country. The nation's crime-risk communities legitimately demand effective law enforcement and look to the *Amici* to provide the highest quality law enforcement services through the most effective means available.

STATEMENT OF THE CASE

Alonzo Jay King was arrested in April 2009 and charged with first and second degree assault. Pursuant to Maryland's DNA Collection Act, Md. Code Ann., Pub. Safety § 2-504, *et seq.* (LexisNexis 2011 Repl. Vol.), law enforcement authorities required Mr. King to submit to a buccal swab of his inner cheek to obtain a DNA sample. In accordance with the State's regulations, the sample was submitted to the Combined DNA Index System ("CODIS") for a comparison to other unknown samples on file. [2]

---

[2] Petitioner and other *amici* in this case have provided the Court with detailed explanations of the operation of the CODIS database as well as the scientific basis underlying the analysis of DNA evidence for purposes of identification. *See, e.g.*, Petitioner's Brief at 3–4, 15–16. A number of appellate cases also summarize this important information. *See, e.g., United States v. Mitchell*, 652 F.3d 387, 399–402 (3d Cir. 2011); *Boroian v. Mueller*, 616 F.3d 60, 65–66 (1st Cir. 2010). For these reasons, we do not further explain these matters here.

The analysis showed a match between Mr. King's DNA sample and a sample retrieved from the investigation of an unsolved rape that had occurred in 2003. Based on this match, King was charged with the rape and robbery.

After failing to have the DNA evidence suppressed before trial, King agreed to waive his right to a jury trial and agreed to be tried on an undisputed statement of facts. He was convicted of first degree rape, and appealed his conviction. The conviction was overturned by the Court of Appeals of Maryland, the State's highest court, which held that the taking of Mr. King's DNA evidence was unreasonable under the Fourth Amendment, and should have been suppressed by the trial court.[3]

---

[3] The Maryland Court gave no consideration to applying the "good faith" exception to the remedy of suppression. *See United States v. Leon*, 468 U.S. 897, 920–21 (1984); *see also Davis v. United States*, ___ U.S. ___, 131 S. Ct. 2419, 2433 (2011) (stating that the exclusionary rule is not a "personal constitutional right" . . . it is a "judicial sanction" and concluding that when the police rely in good faith on binding precedent, the exclusionary rule does not apply. The court further stated "[i]t is one thing for the criminal 'to go free because the constable has blundered'. . . It is quite another to set the criminal free because the constable has scrupulously adhered to governing law. Excluding evidence in such cases deters no police misconduct and imposes substantial social costs.") (citation omitted); *Illinois v. Krull*, 480 U.S. 340 (1987) (recognizing the good faith exception to the exclusionary rule when an officer reasonably relied on a statute authorizing a warrantless search that was subsequently declared unconstitutional). It appears that the exception would have applied to the facts of this case since there was no allegation of police misconduct. The sole basis for suppression was the *post hoc* determination that the enabling statute was unconstitutional, as applied to Mr. King.

The State of Maryland filed a petition for *certiorari* review with this Court and moved the Court to stay enforcement of the Court of Appeals' decision. The Court granted both requests.

INTRODUCTION AND SUMMARY OF ARGUMENT

Each law enforcement officer in this country takes an oath to uphold the United States Constitution and the constitution and laws of the various states. In support of this oath and to serve the public safety needs of their communities, officers are tasked with conducting investigations that have a dual goal: to exonerate the innocent and to arrest and lay the investigative groundwork that will ensure conviction of the guilty. DNA evidence makes a substantial contribution toward achieving this dual goal because it provides an accurate means of suspect identification.

In addition, public safety agencies and correctional facilities have a strong interest in ascertaining the true identity of those in custody for safety and management purposes. In many states, including Maryland, pre-trial detainees and arrestees may be held in local correctional facilities for up to several months before trial, and proper management of these individuals requires firm identification of who they are and what backgrounds they have.

The prompt identification of arrestees allows law enforcement to narrow the focus of criminal investigations and effectively solve cases, new and old, more quickly. DNA collection and testing support the efficiency of this process, while

protecting innocent individuals, and shields officers from potential civil liability for wrongful detentions. By contrast, an arrestee has minimal privacy interests in protecting against discovery either of true identity or of past crimes.

The issue in this case is whether the Fourth Amendment, U.S. Const. amend. IV, allows Maryland to collect and analyze DNA evidence, without a warrant, from a person who was lawfully arrested and taken into custody.

Traditional Fourth Amendment analysis resolves this issue by requiring a court to determine the "reasonableness" of a search in light of the "totality of the circumstances" and to weigh the legitimate interests of the government against the privacy interests of the person who has been subjected to a search or seizure. *United States v. Knights*, 534 U.S. 112, 118–19 (2001); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989); *accord Samson v. California*, 547 U.S. 843, 848–57 (2006); *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

In this case, the Court of Appeals of Maryland undervalued the significant governmental law enforcement interests at stake, and inflated the privacy interests of the arrestee, Mr. King, erroneously tipping the balance in his favor. As a result, the Court improperly and unnecessarily limited the ability of law enforcement to confirm the identity of arrestees. This restriction on the operation of Maryland's statute substantially limits the effectiveness of law enforcement investigations and undermines the administration of pre-trial detention facilities. Thus the search of Mr. King, if it was a search at all, was reasonable because

legitimate law enforcement interests far outweighed his minimal privacy interests. The Maryland court's decision must therefore be reversed.

Amici further assert that the minimally intrusive DNA sampling undertaken by the police in this case also survives scrutiny under two alternative constitutional justifications: (1) that if the sampling was a search, it was valid as incident to a lawful arrest; and (2) that the DNA sampling was not a search at all within the meaning of Fourth Amendment jurisprudence.

This case offers this Court the opportunity to establish a "bright-line" rule for constitutional analysis by acknowledging that the non-invasive taking of a DNA sample incident to a lawful custodial arrest is, in and of itself, reasonable under the Fourth Amendment, and these *amici* urge the Court to so rule.

ARGUMENT

Assuming that a non-invasive swab of an arrestee's mouth is a "search," *see Skinner*, 489 U.S. at 616 (when government seeks to obtain physical evidence from a person, Fourth Amendment is implicated); *accord Boroian v. Mueller*, 616 F.3d 60, 65 (1st Cir. 2010), this search was reasonable and thus constitutionally permissible because only unreasonable searches are prohibited by the Fourth Amendment. *See Knights*, 534 U.S. at 118–19; *Skinner*, 489 U.S. at 619.

Reasonableness in the Fourth Amendment context is determined by weighing the privacy interests of the individual against the legitimate government interests advanced by the search.

Samson v. California, 547 U.S. 843, 848–57 (2006) (on balance, police officer's warrantless, suspicionless search of a parolee was reasonable under the Fourth Amendment); *Bell v. Wolfish*, 441 U.S. 520, 559 (1979) (when balancing interests a court must consider the scope of the intrusion, where and how it was conducted, as well as its justification.) The DNA buccal swab incident to arrest of search of Mr. King was reasonable because legitimate law enforcement interests far outweigh his minimal privacy interests in that context.

I. THE GOVERNMENT HAS WEIGHTY INTERESTS IN THE PROMPT IDENTIFICATION AND PROSECUTION OF PERPETRATORS OF CRIME AND THE EXONERATION OF THE INNOCENT.

The government's interests in utilizing DNA material as evidence in the administration of justice are numerous and significant. Many states, in addition to Maryland, have enacted DNA collection laws to enhance the ability of federal, state, and local criminal justice and law enforcement agencies to identify individuals in criminal investigations, to detect recidivist acts and actors, to identify and locate missing and unidentified persons, and to identify and manage individuals kept in custody. *See, e.g.*, Fla. Stat. Ann. § 943.325 (LexisNexis 2012); Va. Code § 19.2-310.2–.7 (LexisNexis 2012).

In *District Attorney's Office v. Osborne*, 557 U.S. 52, 55 (2009), this Court recognized that DNA testing "has the potential to significantly improve both the criminal justice system and police investigative practices." The federal courts of appeal have recently acknowledged that law

enforcement has "a strong and important interest in apprehending and prosecuting those who have committed violent crimes...." *United States v. Davis*, 690 F.3d 226, 249 (4th Cir. 2012); *Haskell v. Harris*, 669 F.3d 1049, 1062–65 (9th Cir. 2012) (government has an interest in identifying arrestees, solving past crimes, and exonerating innocent individuals), *reh'g en banc granted*, 686 F.3d 1121 (2012); *see also United States v. Mitchell*, 652 F.3d 387, 413 (3d Cir. 2011) (the government has a compelling interest in identifying arrestees), *cert. denied*, 132 S. Ct. 1741 (2012); *accord Anderson v. Commonwealth*, 650 S.E.2d 702, 706 (Va. 2007) (government has an interest in absolute identification of an arrestee, including whether he is otherwise wanted); *Jones v. Murray*, 962 F.2d 302, 307 (4th Cir. 1992) (referring to DNA as a "dramatic new tool for the law enforcement effort to match suspects and criminal conduct").

Early use of conclusive DNA evidence prevents faulty investigative thinking by law enforcement agents and helps to prevent investigative failures. The ability of the police to respond to unsolved crimes, seize unapprehended offenders, and prevent wrongful convictions is enhanced by the use of DNA collection.

In connection with these goals, the government has a compelling interest in entering and maintaining DNA information in CODIS in order to fully realize its efficacy as a law enforcement tool. *See Davis*, 690 F.3d at 249 (citing *Haskell*, 669 F.3d at 1062). Moreover, it is important for the government to obtain this information sooner rather than later because the early use of DNA evidence

can "speed both the investigation of the crime of arrest and the solution of any past crime for which there is a match in CODIS." *Mitchell*, 652 F.3d at 415.[4]

Law enforcement officials who are responsible for the safe management of pre-trial detainees also depend heavily on the accurate identification of those in their custody. In this setting, it is particularly significant that the officials know not only the individual's name but also whether "a suspect is wanted for another offense, or has a record of violence or mental disorder." *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 186 (2004). This information "is critical to the determination of whether or not [a court should] order detention pending trial." *Mitchell*, 652 F.3d at 414. Jail officials also need this information to properly segregate prisoners once detained.

In addition, there is a strong governmental and societal interest in helping crime victims cope with what has happened to them. The government has a "monumental" interest in "bring[ing] closure to countless victims of crime who long have languished

---

[4] When a law enforcement officer has lawful custody of an arrestee, even for a minor offense, the officer has a rich opportunity to investigate whether the individual may be responsible for other crimes. One may reflect on the ancient adage that "He is a fool who leaves things close at hand to follow what is out of reach." Plutarch (A.D. 46–120), *reprinted in* John Bartlett, *Bartlett's Familiar Quotations* 107 (16th ed. 1992), or the slightly more modern iteration: "Better a bird in the hand than ten in the wood." John Heywood, *Proverbs* pt. 1, ch. 2 (1546), *reprinted in Bartlett's Familiar Quotations* 107 (16th ed. 1992). *See also* Petitioner's Brief at 24.

in the knowledge that [their] perpetrators remain at large." *United States v. Kincade*, 379 F.3d 813, 838–39 (9th Cir. 2004) (en banc).

A case revealing that the use of DNA evidence yields concrete, effective results in this realm was described in *The Washington Post* on December 15, 2012. This article describes how, after two years of investigation, a DNA match led to the arrest of a perpetrator alleged to have murdered a 19-year old woman.[5] The victim's family and friends expressed "tremendous relief" at his apprehension. Justin Jouvenal, *Arrest in 2010 Va. Killing Came After Hope Almost Gone,* Wash. Post, Dec. 15, 2012, at B1, B4.

Supporting and assisting the victims of crimes further aid law enforcement in its community relations and criminal prosecutions. Prompt and effective criminal investigation enhances the public's confidence in its police agencies and leads to more citizen cooperation in law enforcement efforts and more effective policing.

News reports of successful investigations and prosecutions also serve the government's interest in deterring crime. DNA evidence aids law enforcement in this effort, preventing investigations from going "in the wrong direction, [allowing] the true perpetrator to remain free to prey on new victims." Michael D. Ranalli, *Wrongful Convictions and*

---

[5] *The Washington Post* later reported that a fingerprint match led police to the killer. Justin Jouvenal, *Fingerprint Match Led to Suspect in 2010 Slaying*, Wash. Post, Dec. 19, 2012, at B3. Since DNA was collected at the crime scene, police will now use the DNA to confirm a match from DNA collected from the suspect.

Officer Safety: Shifting the Focus to the Process, The Police Chief, Jan. 2012 at 26, 28. On the other hand, deterrence efforts and public confidence are undermined when criminals like Mr. King, who was convicted of a violent rape, are allowed to walk free.[6] *See Davis*, 690 F.3d at 256 (declining to exclude even improperly obtained DNA evidence so as not to allow "a person convicted of a deliberate murder to go free").

DNA evidence has also played a key role in identifying arrestees and convicted individuals who were in fact innocent. There can be no more compelling interest in a modern democracy. Law enforcement and local communities have a strong interest in preventing, and when appropriate, helping to overturn wrongful convictions. Law enforcement officers recognize that their "ethical obligation of exonerating the innocent is equally matched by the obligation of arresting the guilty." Michael D. Ranalli, *Wrongful Convictions and Officer Safety: Shifting the Focus to the Process*, The Police Chief, Jan. 2012 at 26.

Indeed, IACP has identified the problem of wrongful convictions as one of its signature issues to address. Walter A. McNeil, *President's Message: Our Recommitment to Addressing Wrongful Convictions*, The Police Chief, June 2012, at 6. Key to IACP's

---

[6] The Court of Appeals of Maryland's decision received significant public attention in the local press. A front page article from the *Baltimore Sun* highlighted the potential impact of the decision on innocent victims. In one case, a man convicted of raping a 13-year-old girl in 2010 could be set free in light of the Court of Appeals' decision. Yvonne Wenger, *DNA Call Could Undo Rape Case*, Balt. Sun, June 10, 2012, at 1.

effort is "the increased use of DNA evidence and increased DNA laboratory resources to aid in the exoneration of those wrongfully convicted . . . ." *Id.*

On a near constant basis, media headlines document that DNA evidence contributes significantly to the exoneration of arrestees, even in the early stages of an investigation. On June 30, 2012, *The Washington Post* reported that DNA results exonerated two Prince George's County, Maryland teenagers who had been charged with rape. Investigators indicated that the charges had been based "on the faulty word of an acquaintance of theirs," an accusation that in years past could have lead to a wrongful conviction and imprisonment. Matt Zapotosky, *DNA Results Exonerate Two Teens in Rape Case*, Wash. Post, June 30, 2012, at B3. Instead, the teenagers were released.

DNA exoneration unfortunately came much later for another Maryland man who served fifteen years in prison before being cleared. His case was reported by *The Washington Post* on October 31, 2010. Dan Morse, *After 15 Years in Prison, Montgomery Man is Cleared of Murder*, Wash. Post, Oct. 31, 2010, at C4. On December 15, 2012, *The Washington Post* reported that a man "who spent 28 years in prison for a murder he didn't commit was formally declared innocent by a Superior Court judge. . . ending his long fight for exoneration." The judge's order noted that the "new DNA evidence conclusively shows. . . that he did not commit the crimes he was convicted of at trial." Spencer S. Hsu, *After Lengthy Prison Term, D.C. Man is Exonerated,* Wash. Post, Dec. 15, 2012 at B1.

One of the most poignant exoneration stories of note appeared in the *Baltimore Sun* on December 19, 2012 in its remembrance of Judge S. Ann Brobst of the Circuit Court for Baltimore County. Before her elevation to the bench, Judge Brobst was a highly regarded and successful prosecutor who had twice convicted Kirk Bloodsworth of the murder and rape of a nine year old child. In her estimation, the evidence against Mr. Bloodsworth was "absolutely damning." Frederick N. Rasmussen, *Judge S. Ann Brobst, Longtime Baltimore County Prosecutor*, Balt. Sun, Dec. 19, 2012, at A18. However, after he had spent almost a decade in prison, some of that time on death row, Mr. Bloodsworth was exonerated by DNA evidence. Judge Brobst, a "tireless advocate for justice," visited and apologized to Mr. Bloodsworth and forever "wished [the wrongful conviction] never happened." *Id.* Ultimately, the same DNA evidence that exonerated Mr. Bloodsworth was used to convict the real perpetrator. *Id.*

The Innocence Project reports that the government has financially compensated 65% of the three hundred one (301) individuals who have been exonerated by post-conviction DNA analysis since 1989. Those innocent individuals served an average of 13.6 years in prison; eighteen of those individuals had been sentenced to death. As a result of the post-conviction DNA testing, in one hundred forty-six (146) of the cases, the true perpetrators were later identified. *Facts on Post-Conviction DNA Exonerations*, Innocence Project, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited Dec. 6, 2012).

The exoneration of innocent individuals early in a crime investigation enhances officer safety, protects law enforcement officers from civil liability, protects the government fisc, and allows innocent individuals to be freed while those guilty of crimes are brought to justice. Extensive and expensive litigation ensues when the wrongfully arrested or convicted sue officers for constitutional and common law claims. The government has a strong interest in preventing potential liability for itself and its employees while at the same time supporting a process that convicts the guilty and not the innocent. *See, e.g.*, *Winslow v. Smith*, 696 F.3d 716 (8th Cir. 2012) (protracted litigation based on "reckless investigation" where DNA evidence ultimately exonerated suspect.)

II. THE PRIVACY INTERESTS OF ANY ARRESTEE ARE MINIMAL AND THE NON-INVASIVE METHOD USED TO TAKE A DNA SAMPLE IS NOT OFFENSIVE TO THE FOURTH AMENDMENT.

A. An Arrestee Has No Significant Privacy Interest In Maintaining Anonymity Or Preventing Discovery Of Other Crimes He Has Committed.

When a police officer has lawfully arrested an individual upon probable cause, the individual "has a grossly diminished privacy expectation." *King v. State of Maryland*, 42 A.3d 549, 583 (2012) (Barbera, J., dissenting). It is indisputable that an officer has the authority to arrest an individual and take him or her into custody if there is probable cause to believe that the individual has committed or is committing an offense. *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979). Once an individual is suspected by the

quantum of probable cause to have violated society's standards, the individual has, by his or her actions, undermined his own privacy interest. *Jones,* 962 F.2d at 306 (basis of probable cause and a subsequent arrest leads to loss of liberty and the loss of "at least some, if not all, rights to personal privacy . . ."); *see also United States v. Robinson,* 414 U.S. 218, 237 (1973) (Powell, J., concurring) ("I believe that an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person.")

Indeed, this Court and others have held that an arrestee has no privacy right to his identity and no right to remain anonymous. *Hiibel* 542 U.S. at 186–87; *accord Mitchell,* 652 F.3d at 412 (once arrested, an individual has a diminished expectation of privacy in his own identification, as has traditionally justified the taking of photographs and fingerprints); *Anderson,* 650 S.E. 2d at 705 (there is a government interest in knowing for an "absolute certainty the identity of the person arrested"). Likewise, the individual has no meaningful expectation of privacy in concealing other crimes that the individual committed. *Rakas v. Illinois*, 439 U.S. 128, 143, n.12 (1978) ("[A] 'legitimate' expectation of privacy by definition means more than a subjective expectation of not being discovered.").

DNA comparisons offer substantial aid to law enforcement agents in establishing who an individual is and what else the individual may have done in violation of the law. *See Jones* 962 F.2d at 307. Once Mr. King was arrested, he had no privacy right in withholding his DNA identification.

Given the totality of the circumstances, the taking and use of DNA evidence as authorized by Maryland law is reasonable and does not violate the Fourth Amendment. Accordingly, the decision of the Court of Appeals of Maryland must be reversed.

B. If It Is A Search, The Taking Of A DNA Sample Is A Reasonable Search Sanctioned By The Doctrine Of Search Incident To Arrest.

Once a law enforcement officer takes an individual into custody based on the probability that he has committed a crime, the officer undertakes certain administrative functions to insure the officer's own safety, and that of the arrestee, as well as that of other pre-trial detainees and prison staff. The officer seeks to identify with certainty who the arrestee is and to preserve any evidence that may be on or near the arrested person. For this reason, as part of that custodial situation, arrestees are subject to a number of physical intrusions by law enforcement officers, including being handcuffed, forcibly transported to another location, subjected to fingerprinting and photographs, and searched about their persons, including a strip search. *King v. State of Maryland*, 42 A.3d at 583 (citing *Robinson*, 414 U.S. at 235 (search of person and possessions); *Florence v. Cnty. of Burlington*, ___ U.S. ___, 132 S. Ct. 1510 (2012) (warrantless strip search of arrestee permitted); *see also* Petitioner's Brief at 16–19. Recognizing these legitimate law enforcement necessities, the Court has authorized the police to undertake searches "incident to arrest."

The Court first referred to an officer's right to search the individual incident to arrest in *dictum* in *Weeks v. United States*, 232 U.S. 383, 392 (1914) (describing the right of the government "to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime"), *overruled on other grounds by Elkins v. United States*, 364 U.S. 206 (1960) (holding that federal courts could not receive evidence obtained by state officers if the evidence was obtained by a means prohibited to the federal government). In subsequent decades, the principle of searching the individual – and the place where the individual was arrested – underwent an evolution and it is now firmly established that law enforcement has wide latitude to search an individual incident to arrest, and somewhat less latitude to search the place an individual is arrested. *See Arizona v. Gant*, 556 U.S. 332 (2009) (warrantless search of arrestee's vehicle is only reasonable as to areas that arrestee might access at the time of search or that might contain evidence of the crime for which arrest was made); *United States v. Edwards*, 415 U.S. 800, 808–09 (1974) (distinguishing between privacy of premises and privacy of person at time of legal arrest); *Chimel v. California*, 395 U.S. 752, 755–59 (when suspect is arrested in the suspect's home, search of the home must be limited in scope to areas where the suspect has access to a weapon or ability to destroy evidence); *accord Knowles v. Iowa*, 525 U.S. 113 (1998) (warrantless search of a vehicle is unconstitutional where offender is charged by citation and not arrested).

With respect to searches of persons law enforcement has had wide latitude since at least 1973. In *United States v. Robinson*, the Court first held that when there is a lawful custodial arrest, an officer may conduct a full search of the person incident to that arrest as both an exception to the warrant requirement, and also as a reasonable search under the Fourth Amendment since the lawful arrest essentially establishes the authority to search. 414 U.S. 218, 229, 235 (1973).

In *Cupp v. Murphy*, 412 U.S. 291 (1973), the Court approved the constitutionality of the government's compelled taking of fingernail scrapings from a murder suspect because the police had probable cause to arrest the suspect, even though the suspect had not actually been formally arrested. The limited intrusion into the accused's personal privacy incident to the accused's detention in the station house rendered the search reasonable. *Id.* at 296.

The next year, in *Edwards*, the Court recognized that the "prevailing rule under the Fourth Amendment that searches and seizures may not be made without a warrant is subject to various exceptions. One of them permits warrantless searches incident to custodial arrests." 415 U.S. at 802 (citation omitted). As such, the Court confirmed that these searches may be of the individual and the property in the arrestee's immediate possession, and that the police had the authority to search the arrestee's clothing, even though they did not examine the clothing until ten hours after the arrest.

In 1979 *Michigan v. DeFillippo* further extended this doctrine to encompass a search incident to arrest, even if the ordinance on which the arrest was based is later declared unconstitutional. The fact of a presently lawful arrest, standing alone, authorizes the search. 443 U.S. at 36–37.

In *Illinois v. Lafayette,* 462 U.S. 640 (1983), the Court relied extensively on the principles articulated in *Robinson* when it upheld the inventory search of an arrestee's personal effects as incident to the arrest for reasons similar to those attendant to the search incident to arrest exceptions: officer and suspect safety, the protection of property, the discovery of potential evidence and the identification of the suspect. *Id.* at 645–46.

In 2008 the Court decided *Virginia v. Moore,* 553 U.S. 164 (2008) in which it upheld a search of the individual incident to arrest even though the arrest was not authorized by state law. In that case, the individual was arrested for driving on a suspended license, a relatively minor traffic offense, for which Virginia law dictated issuance of a citation. However, because the arrest was based on probable cause, and was thus constitutionally reasonable, the Court found that the search of the person incident to arrest was also lawful. *Id.* at 176–77. *See also United States v. Pope,* 686 F.3d 1078, 1083 (9th Cir. 2012) (search of person upheld because "search was supported by probable cause to arrest . . . "), *cert. denied,* 2012 U.S. Lexis 8769 (Nov. 13, 2012).

Indeed, this Court has approved searches of the person incident to arrest that are much more invasive than the minimally intrusive DNA swab in the present case. For example, in *Schmerber v. California*, 384 U.S. 757 (1966), the Court permitted the non-consensual drawing of a suspect's blood sample as incident to the suspect's arrest for driving under the influence. In *Schmerber*, the Court recognized that both the extraction and "the test chosen to measure petitioner's blood-alcohol level" were reasonable. *Id.* at 771. DNA sampling is eminently reasonable as a search incident to arrest, even assuming it is a search.

C. The Taking Of A DNA Sample Upon Arrest Is Not A Search Within The Meaning Of The Fourth Amendment.

Alternatively, the Court may find that DNA sampling of those taken into custody is administrative in nature and does not even constitute a search as defined by the Fourth Amendment. As discussed above, arrested persons have a diminished expectation of privacy from the outset. A search in Fourth Amendment terms occurs when the government invades or infringes on a subjective expectation of privacy that is recognized as reasonable. *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring); *see also Davis*, 690 F.3d at 232 n.11 (recognizing that an action is a "non-search" for Fourth Amendment purposes where no privacy interests are implicated); *but see also Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. at 616 (when government seeks to obtain

physical evidence from a person, Fourth Amendment is implicated); *accord Boroian v. Mueller*, 616 F.3d at 65.

Members of society have known since *United States v. Robinson* was decided in 1973 that an arrest itself authorizes the police to conduct an extensive search of their persons without any additional justification. The Court was quite clear: "It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the individual is not only an exception to the warrant requirement of the Fourth Amendment, but is also a reasonable search under that Amendment." 414 U.S. at 235. Indeed, Justice Powell took the analysis one step further in his concurrence: "The search incident to arrest is reasonable under the Fourth Amendment because the privacy interest protected by that constitutional guarantee is legitimately abated by the fact of arrest." *Id.* at 235–36 (Powell, J., concurring).

For at least the last twenty years, members of the public have likewise been aware through media reports and court decisions that DNA samples can reveal the true identity of individuals and that such processes are used by law enforcement agents for legitimate governmental purposes. Indeed, it is surely common knowledge that DNA samples may be used much like fingerprints and may be taken as part of the "routine booking process" following arrest. Like the taking of fingerprints and photographs, the searches of the person and of

his belongings, the taking of a DNA sample is another of the "processing" activities that is reasonable in light of the arrest and thus should not even be regarded as a search. No reasonable arrestee should harbor an expectation of privacy in the limited amount of DNA information that is taken by the government through the buccal swab sampling.[7]

As the Court expressed in *Virginia v. Moore*, administering Fourth Amendment law is best done with "bright-line" rules. 553 U.S. at 175–177. This case presents the opportunity for the Court to announce such a bright line rule by holding that the taking of a sample of DNA by a non-invasive means and for the weighty governmental purposes advanced by Maryland's statute from an individual who has been lawfully arrested is a constitutional search incident to arrest, or not a search at all, and that the Maryland statute is therefore constitutional.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals of Maryland should be reversed.

---

[7] Certainly, there is no expectation of privacy in the same type of DNA evidence that may be left behind at a crime scene, on discarded clothing, or at the police station. *See, e.g., Raynor v. State*, 29 A.3d 617, 625 (Md. App. 2011) (DNA swabbed from a chair appellant sat in at the police station was admissible because "even if appellant could demonstrate a *subjective* expectation of privacy in his DNA, he nonetheless had no *objectively reasonable* expectation of privacy in it because it was used for identification purposes only") (emphasis in original), *cert. granted*, 52 A.3d 978 (Md., 2012).

Respectfully submitted,

/s/ Karen J. Kruger
KAREN J. KRUGER
Counsel of Record
Funk & Bolton, P.A.
Twelfth Floor
36 South Charles St.
Baltimore, MD 21201
410.659.7700
kkruger@fblaw.com

Counsel for Amici Curiae

Of Counsel
George Nilson
City Solicitor
Suzanne Sangree
Chief Solicitor
City of Baltimore
Department of Law
100 N. Holliday St.
Room 109
Baltimore, MD 21202
410.396.3249
suzanne.sangree@
Baltimorecity.gov

Attorneys for Mayor and City Council of Baltimore

Marc P. Hansen
County Attorney
Sarah Daken
Assoc. County Attorney
100 Edison Park Drive
Gaithersburg, MD 20878
240.777.6740
sarah.daken@montgomer
ycountymd.gov

Attorneys for Montgomery County, Maryland

Gene Voegtlin, Esq.
International Association
of Chiefs of Police, Inc.
515 N. Washington St.
Alexandria, VA 22312
703.836.6767
voegtlin@theiacp.org

Attorney for International Association of Chiefs of Police, Inc.

Of Counsel
Jacqueline Daley, Esq.
Major Cities Chiefs
Association
315 East 200 South
Salt Lake City, UT 84111
(215) 685-8777
jacqueline.daley
@phila.gov

Attorney for Major Cities
Chiefs Association

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JAN - 2 2013
OFFICE OF THE CLERK

No. 12-207

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MARYLAND,
Petitioner,

v.

ALONZO JAY KING, JR.,
Respondent.

On Writ of Certiorari
to the Court of Appeals of Maryland

BRIEF FOR AMICI CURIAE MARYLAND COALITION AGAINST SEXUAL ASSAULT IN SUPPORT OF PETITIONER

(Additional Amici Curiae, all sexual assault coalitions, are identified on inside cover.)

William C. Sammons*
Kristin P. Herber
Lydia S. Hu
Tydings & Rosenberg LLP
100 East Pratt Street, 26th Floor
Baltimore, Maryland 21202
(410) 752-9700
wsammons@tydingslaw.com

Counsel for Amici Curiae
*Counsel of Record

Additional Amici Curiae

Alaska Network on Domestic Violence and Sexual Assault
Arkansas Coalition Against Sexual Assault
Colorado Coalition Against Sexual Assault
Sexual Assault Network of Delaware
DC Rape Crisis Center
Florida Council Against Sexual Violence
Illinois Coalition Against Sexual Assault
Indiana Coalition Against Sexual Assault
Kentucky Association of Sexual Assault Programs
Louisiana Foundation Against Sexual Assault
Maine Coalition Against Sexual Assault
Jane Doe, Inc. (Massachusetts Sexual Assault Coalition)
Nebraska Domestic Violence Sexual Assault Coalition
New Jersey Coalition Against Sexual Assault
Oklahoma Coalition Against Domestic Violence and Sexual Assault
Ohio Alliance to End Sexual Violence
Oregon Coalition Against Domestic and Sexual Violence
Pennsylvania Coalition Against Rape
Day One, The Sexual Assault & Trauma Resource Center (Rhode Island Sexual Assault Coalition)
Tennessee Coalition to End Domestic and Sexual Violence
Texas Association Against Sexual Assault
Utah Coalition Against Sexual Assault
Vermont Network Against Domestic and Sexual Violence
West Virginia Foundation for Rape Information and Services
Wisconsin Coalition Against Sexual Assault
Wyoming Coalition Against DV/SA

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. THE STATE'S INTEREST IN SOLVING (AND PREVENTING) SEXUAL CRIMES SHOULD OUTWEIGH PRIVACY CONSIDERATIONS PRESENTED BY COLLECTION OF DNA FROM CERTAIN ARRESTEES. 9

II. THE RESTRICTIVE DEFINITION OF "IDENTIFICATION" USED BY THE MARYLAND COURT UNDER GUISE OF PROTECTING PRIVACY IGNORES THE PUBLIC NATURE OF THE ARRESTEE'S CRIMINAL SEXUAL ASSAULT HISTORY AND THE INTERESTS OF SEXUAL ASSAULT SURVIVORS 11

III. ARRESTEE DNA COLLECTION PROVIDES AN INVALUABLE TOOL FOR SOLVING AND PREVENTING SEXUAL CRIMES 16

IV. DNA EVIDENCE SURMOUNTS UNIQUE HURDLES INHERENT IN THE PROSECUTION OF SEXUAL ASSAULT AND RAPE 21

A. DNA Provides Identification Evidence in Sexual Assault Cases When Eyewitness Identification is Unreliable or Unavailable 22

B. Juries Expect Prosecutors To Present DNA Evidence In Sexual Assault Cases 24

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Anderson v. Virginia, 274, 650 S.E.2d 702 (Va. 2007) 16
Haskell v. Harris, 669 F.3d 1049 (9th Cir. 2012) 9, 10, 12, 13
Jones v. Murray, 962 F.2d 1302 (4th Cir. 1992) 10, 16
King v. State, 425 Md. 550, 42 A.3d 549 (2012) ..... passim
Missouri v. Dickson, 337 S.W.3d 733 (Mo. Ct. App. 2011) 23
People v. Buza, 197 Cal. App. 4th 1424, 129 Cal. Rptr. 3d 753 (2011) 11, 12, 13
United States v. Davis, 657 F. Supp. 2d 630 (D. Md. 2009) 15
United States v. Kincade, 379 F.3d 813 (9th Cir. Cal. 2004) 14
United States v. Knights, 354 U.S. 112 (2001) 8
United States v. Mitchell, 652 F.3d 387 (3d Cir. 2011) ..... passim

Statutes and Regulations

Md. Code Ann., Pub. Safety Art., § 2-504(a)(3) (2011 Repl. Vol.) 5
COMAR 10.12.02 (Maryland Dept. Health and Mental Hygiene Regulations on Rape & Sexual Offenses--Physician and Hospital Charges) 15

Maryland Legislative Materials

H.B. 370 Bill File (2008) 18, 19, 20, 22
S.B. 51 Bill File (2008) 21

Journals

G. Steketee & E. B. Foa, *Rape Victims: Post-Traumatic Stress Responses And Their Treatment: A Review Of The Literature*, 1 JOURNAL OF ANXIETY DISORDERS 69-86 (1987)..... 4
Gabriel, Matthew, *et al.*, *Beyond the Cold Hit: Measuring the Impact of the National DNA Data Bank on Public Safety at the City and County Level*, 38 J. L. MED. & ETHICS 396 n.8 (2010)..... 16
Kilpatrick, D. G. *et al.*, *Violence and Risk Of PTSD, Major Depression, Substance Abuse/Dependence, and Comorbidity: Results from the National Survey of Adolescents*, 71 JOURNAL OF CONSULTING & CLINICAL PSYCHOLOGY 692-700 (2003)..... 4
Lisa Tripp, *The Medico-Legal Aspects of Dementia-Driven Sexual Abuse in Nursing Homes*, 12 MARQEA 363, 363-66 (Spring 2011)..... 23
Pamela Teaser, Karen Roberto, Joy Duke-Kim, *Sexual Abuse of Older Adults: Preliminarily Findings of Cases in Virginia*, JOURNAL OF ELDER ABUSE AND NEGLECT, 12 (3/4):1-16, 1993..... 4
Robin R. Runge, *Failing to Address Sexual and Domestic Violence at Work: The Case of Migrant Farmworker Women*, 20 Am. U. J. GENDER SOC. POL'Y & L. 871, 893-94 (2012) 23, 24

S. E. Ullman & L. R.Brecklin, *Sexual Assault History and Suicidal Behavior in a National Sample of Women*, 32 SUICIDE & LIFE-THREATENING BEHAVIOR 117-130 (2002) 5

Other Authorities

Cassia Spohn & Julie Horney, *Rape Law Reform: A Grassroots Revolution and Its Impact*, 73 (1992) . 3
Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey*: 2010 summary report, http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf 3
Christina Ng & Abbie Boudreau, *et al.*, murdered Barista Whitney Heichel was raped, shot several times, Oct. 22, 2012 (last visited Dec. 18, 2012), http://abcnews.go.com/US/murdered-barista-Whitney-heichel-raped-shot-times/story?id=17534209..... 23
DNASaves, www.dnasaves.org/stories..... 21
FBI, Uniform Crime Reports: 2006-2010..... 3
Lisak, David and Miller, Paul M., *Repeat Rape and Multiple Offending Among Undetected Rapists*, Violence and Victims, Vol. 17. No. 1, 78-80 (2002) 10, 17
Maryland Uniform Crime Report, 2003..... 7
National Center for Policy Analysis, Crime and Punishment in America, 1999..... 3
SAFEta source, Sexual Assault Forensic Examiner Technical Assistance, www.safeta.org/displaycommon.cfm?an=1&subarticlenbr=142 (last visited Dec, 27, 2012)..... 15

Timothy B. Wheeler, *O'Malley urges DNA collection*, BALT. SUN, Feb. 14, 2008, http://articles.baltimoresun.com/2008-02-14/news/0802140270_1_dna-samples-taking-dna-dna-databases (last visited Dec. 16, 2012). 19

U.S. Bureau of Justice Statistics, *Sexual Assault of Young Children as Reported to Law Enforcement* (2000) 22

U.S. Bureau of Justice Statistics, *Special Report: Violence Against Women: Estimates from the Redesigned Survey* (NCJ-154348), August 1995 .. 3

U.S. Department of Justice, Bureau of Justice Statistics, 2011 Criminal Victimization report, 8..... 7

INTEREST OF THE AMICI CURIAE[1]

The Maryland Coalition Against Sexual Assault (MCASA), and the other amici curiae identified below, write in support of the petitioner, the State of Maryland.

MCASA is the Maryland statewide collective voice advocating for accessible, compassionate care for survivors of sexual assault and abuse, accountability for all offenders, and prevention of sexual violence. Established in 1982 as a private, not for profit 501(c)(3) organization, MCASA works closely with local, state, and national organizations to address issues of sexual violence in Maryland. It is the federally recognized state sexual assault coalition for Maryland. MCASA is a membership organization that includes Maryland's seventeen rape crisis centers, health care personnel, attorneys, law enforcement, other allied professionals, concerned individuals, survivors of sexual violence and their loved ones. MCASA includes the Sexual Assault Legal Institute (SALI), which provides legal services for sexual assault and abuse survivors.

Other federally recognized state sexual assault coalitions from across the country join

---

[1] The parties have consented to the filing of this brief and letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

MCASA as amici curiae in support of the petitioner. They are: The Alaska Network on Domestic Violence and Sexual Assault, Arkansas Coalition Against Sexual Assault, Colorado Coalition Against Sexual Assault, Sexual Assault Network of Delaware, DC Rape Crisis Center, Florida Council Against Sexual Violence, Illinois Coalition Against Sexual Assault, Indiana Coalition Against Sexual Assault, Kentucky Association of Sexual Assault Programs, Nebraska Domestic Violence Sexual Assault Coalition, New Jersey Coalition Against Sexual Assault, Oklahoma Collation Against Domestic Violence and Sexual Assault, Ohio Alliance to End Sexual Violence, Pennsylvania Coalition Against Rape, Tennessee Coalition to End Domestic and Sexual Violence, Texas Association Against Sexual Assault, Vermont Network Against Domestic and Sexual Violence, West Virginia Foundation for Rape Information and Services, Wisconsin Coalition Against Sexual Assault, and the Wyoming Collation Against DV/SA. All are sister state coalitions of rape crisis and recovery centers across the nation that advocate and organize against sexual violence and for survivors within their respective jurisdictions.

The amici wish to address the Court on behalf of survivors of rape and sexual assault, and to urge this Court to reverse the judgment of the Maryland Court of Appeals and to reinstate the judgment of the trial court. The crime in this case, rape, is committed with shocking regularity in the United States. One of every six adult women are victims of

forcible rape in their lifetime,[2] yet, of those crimes reported, only approximately 12% will lead to an arrest[3], only 9% are prosecuted[4] and a mere 5% lead to a felony conviction.[5]

Rape can be perpetrated against either gender, but women are far more frequently victims (nine out of every ten rape victims are female).[6] A staggering number of rape victims are children: recent data show that 30% of female survivors were between the ages of eleven and seventeen at the time of their first completed rape; 12% of females were age ten or younger; and 27.8% of males were age ten or younger.[7] And elderly citizens are not immune from the vicious crime. In a study of elder sexual

---

[2] National Institute of Justice, *Prevalence, Incidence and Consequences of Violence Against Women Survey* (1998), http://www.nij.gov/pubs-sum/172837.htm.

[3] FBI, Uniform Crime Reports: 2006-2010.

[4] National Center for Policy Analysis, Crime and Punishment in America, 1999.

[5] Department of Justice, *Felony Defendants in Large Urban Counties*: average of 2002-2006; *see also* Cassia Spohn & Julie Horney, *Rape Law Reform: A Grassroots Revolution and Its Impact*, 73 (1992).

[6] U.S. Bureau of Justice Statistics, *Special Report: Violence Against Women: Estimates from the Redesigned Survey* (NCJ-154348), August 1995, http://www.bjs.gov/index.cfm?ty=pbdetail&iid=805; U.S. Bureau of Justice Statistics, 2003 National Crime Victimization Survey (2003), http://www.bjs.gov/index.cfm?ty=pbdetail&iid=766.

[7] Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey*: 2010 summary report, http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf.

abuse, 73.1% occurred in a nursing home or adult care facility.[8]

Sexual assault takes its toll mentally and physically on the victim/survivor,[9] often in ways that are unique to the sexual nature of the assault. A victim/survivor may have to make medical decisions regarding unwanted pregnancy, sexually transmitted diseases, including HIV, medical complications due to "date rape drugs" and possible fertility complications such as pelvic inflammatory disease. Mental health concerns include increased risk for post traumatic stress disorder (PTSD), depression, increased substance use, and suicide.[10] Almost 31% of rape survivors develop PTSD during their lifetime.[11] A study drawing from a national sample of women with a history of sexual assault found that 58.4% met the criteria for having

---

[8] Pamela Teaser, Karen Roberto, Joy Duke-Kim, *Sexual Abuse of Older Adults: Preliminarily Findings of Cases in Virginia*, JOURNAL OF ELDER ABUSE AND NEGLECT, 12 (3/4):1-16, 1993.

[9] Amici use the terms "victim," "survivor," and "victim/survivor" interchangeably, recognizing that while Maryland's criminal law uses the term "victim," many advocates and survivors prefer the term "survivor."

[10] *See* Kilpatrick, D. G. *et al.*, *Violence and Risk Of PTSD, Major Depression, Substance Abuse/Dependence, and Comorbidity: Results from the National Survey of Adolescents*, 71 JOURNAL OF CONSULTING & CLINICAL PSYCHOLOGY 692-700 (2003); G. Steketee & E. B. Foa, *Rape Victims: Post-Traumatic Stress Responses And Their Treatment: A Review Of The Literature*, 1 JOURNAL OF ANXIETY DISORDERS 69-86 (1987).

[11] Kilpatrick *et al.*, *Rape in America*, *supra*, note 10.

depression.[12] And in 1992, the National Victim Crime Center conducted a study entitled *Rape in America*, which found that 33% of sexual assault victim/survivors admitted they had considered suicide, a number four times greater than for those people who had not been victimized by crime.[13]

This Court's decision in this case should be made against the backdrop of the foregoing statistics. Rape victim/survivors are in a singular position to provide critical evidence (the DNA of their attackers) to assist the State in solving crime, prosecuting rapists, and preventing the rape of other citizens. The collection of DNA from arrestees greatly enhances the likelihood that cases will be solved and prevented and, as discussed here, it can be done without intruding on reasonable expectations of privacy. It is for this reason that the amici urge this Court to uphold the provisions of the Maryland DNA Collection Act, Md. Code Ann., Pub. Safety Art., § 2-504(a)(3) (2011 Repl. Vol.) that require the mandatory DNA testing of certain arrestees.

SUMMARY OF ARGUMENT

In holding that the collection of arrestee DNA violated the Fourth Amendment, the Maryland Court of Appeals purported to balance the privacy rights of the arrestee against the rights of the State,

---

[12] S. E. Ullman & L. R.Brecklin, *Sexual Assault History and Suicidal Behavior in a National Sample of Women*, 32 SUICIDE & LIFE-THREATENING BEHAVIOR 117-130 (2002).

[13] Kilpatrick *et al.*, *Rape in America*, *supra*, note 10.

but it got that balance wrong in ways that particularly impact the interests of these amici. First, it reduced the weight of the State's legitimate interest in "solving crimes" to zero by concluding that arrestee DNA could not be used for investigation of other crimes. Second, it improperly excluded what the arrestee had done in the past--that is, the arrestee's criminal background--from the definition of "identification" in consideration of the State's legitimate interest in identifying arrestees. In reaching both conclusions, the Maryland Court rejected the analogy between DNA and fingerprinting on bases that do not stand to scrutiny.

To these amici, the State's interest in solving crimes (and preventing future crimes), and the State's interest in identifying what the arrestee has done in the past, are paramount. There is nothing "private" about an arrestee's past criminal history or behavior, and the arrestee has no reasonable expectation of privacy with respect to events that led to the depositing (and abandoning) of DNA at past crime scenes. In contrast, the participation of the sexual assault victim/survivors in the criminal process, through the "collection" of the perpetrator's DNA after a sexual assault, is very public and results in public and humiliating intrusions of the victim/survivor's person. The interests of victim/survivors in solving crimes and in a full identification of the arrestee are co-extensive with those of the State, and they should outweigh any privacy interest of an individual who has been arrested based on probable cause.

Moreover, statistical data and anecdotal evidence show that the collection of arrestee DNA solves crimes and, more importantly, prevents future crimes. Perpetrators of sexual assaults are often recidivists who are arrested many times before they are ultimately convicted. Had those early arrests resulted in DNA collection, as would be the case under the Maryland statute as amended, then the DNA could have been matched with DNA from victims and a crime spree stopped sooner rather than later.

Finally, when it comes to prosecuting sexual assault and rape cases, DNA evidence plays a critical role in obtaining convictions. DNA evidence bolsters witness testimony, identifies the perpetrator in cases where the victim/survivor otherwise cannot do so, and satisfies the modern day juror's expectation to evaluate scientific evidence.

ARGUMENT

On September 21, 2003, Vonette W., a resident of Wicomico County, Maryland, was raped, at gunpoint, by an unknown and unidentifiable assailant. *King v. State*, 425 Md. 550, 556-57, 42 A.3d 549 (2012). That night Vonette W. became one of the 1,358 women raped that year in Maryland who reported the assault to authorities.[14]

---

[14] *See* Maryland Uniform Crime Report, 2003. Based on the Department of Justice's estimate that only about 27% of rape victims report the crime, *see* U.S. Department of Justice, Bureau of Justice Statistics, 2011 Criminal Victimization report, 8, the actual number of sexual assault victims in Maryland that year was likely closer to 5,400. It should be

That crime went unsolved until 2009 when Alonzo Jay King, Jr. was arrested on an unrelated charge that resulted in his DNA being collected and entered into Maryland's then-new "arrestee" DNA database, where it matched with DNA collected from Vonette W. in 2003. King was arrested for his sexual assault on Vonette W., and he was convicted of first degree rape and sentenced to life in prison. *King*, 425 Md. at 557-58.

In overturning that conviction, a divided Maryland Court of Appeals purported to balance the interests of King with those of the State, taking into account the "totality of the circumstances" surrounding the search that led to the collection of King's DNA. *Id.* at 563-64, relying on *United States v. Knights*, 354 U.S. 112, 118-19 (2001) (stating that the "reasonableness" of a search[15] under the Fourth Amendment is determined by the "totality of the circumstances" and a balancing of the "intrusion on individual privacy" of, in this case, an arrestee against "legitimate government interests"). The Court concluded that the balance weighed in favor of King and against the State.

The balancing test used by the Maryland Court below refers to the weighing of the interests of the "State," but for Vonette W. and these amici, the

---

noted that the 2003 statistics used a limited definition of rape further masking the frequency of the crime. The FBI updated this definition in 2012.

[15] The compulsory extraction of DNA is a "search" within the meaning of the Fourth Amendment purposes. *See, e.g., United States v. Kincade*, 379 F.3d 813, 821 n.15 (9th Cir. 2004).

"State's" interest may properly be deemed to be the interest of rape victim/survivors. Those interests are often itemized to include (1) the State's interest in solving past crimes (including "cold cases"); (2) its need to identify the defendant (in this case, the arrestee); and (3) its interest in the exoneration of the innocent. *See King*, 425 Md. at 610-11 (Barbera, J., dissenting) (citing *Haskell v. Harris*, 669 F.3d 1049, 1062-1065 (9th Cir. 2012); *United States v. Mitchell*, 652 F.3d 387, 413-15 (3d Cir. 2011)). The first two are of particular import to these amici.

I. THE STATE'S INTEREST IN SOLVING (AND PREVENTING) SEXUAL CRIMES SHOULD OUTWEIGH PRIVACY CONSIDERATIONS PRESENTED BY COLLECTION OF DNA FROM CERTAIN ARRESTEES.

In determining that King's privacy interests outweighed the interest of the State, the Maryland Court of Appeals ascribed little or no weight to the well-recognized interest of the State in "solving crimes," including sexual crimes. As victim/survivors of sexual crimes that are not only solvable through the use of arrestee DNA collection but are demonstrably preventable with the use of arrestee data collection, these amici have a compelling interest in that "State" interest. *See, e.g., Haskell*, 669 F.3d 1078 (solving crimes "helps bring closure to countless victims of crime who long have languished in the knowledge that perpetrators remain at large") (quoting *Kincade*, 652 F.3d at

839).[16] And, in a sense, the amici's interest is unique. Specifically, because so many sexual assault perpetrators are recidivists with long arrest records, *see* discussion *infra* at Part III, the likelihood of finding matches, and solving past crimes, is high. Moreover, for the same reasons, the early collection of DNA prevents crime--had the recidivists been identified early in their careers through arrestee collection, they would not have been able to commit the bulk of their crimes. *See, e.g., Jones*, 902 F.2d 302, 311 (4th Cir. 1992) (the State has an interest in deterring "felony recidivism"). *See also*, Lisak, David and Miller, Paul M., *Repeat Rape and Multiple Offending Among Undetected Rapists*, VIOLENCE AND VICTIMS, Vol. 17. No. 1, 78-80 (2002) (finding that, in a study of 1,882 "undetected rapists," "almost two thirds of them raped more than once," and, of those, "each committed an average of six rapes and/or attempted rapes and an average of fourteen interpersonally violent acts").

Courts universally regard the solving of crimes as an important State interest, and one that must be weighed in any totality of the circumstances/balancing test in the Fourth Amendment analysis. *See, e.g., Haskell*, 669 F.3d at 1062-65; *Mitchell*, 652 F. 3d at 413-15.[17] But,

---

[16] Recognizing crime victims' unique and personal interest in having crimes solved, Maryland amended its Constitution in 1994. The amendment mandates that victims of crime be treated with dignity, respect, and sensitivity through the criminal justice process. *See* Md. CONST. art. 47.

[17] Even the Respondent here acknowledged below that the solving of "cold cases" was a legitimate State interest. *See* Petr.'s Br. 3 (Md. Ct. App.).

notwithstanding lip service to that interest, some courts appear to denigrate it in the context of DNA collection by arguing, in essence, that "solving crimes" (including sexual crimes) should not weigh heavily in the balancing test because solving a crime necessarily implicates the "investigative" use of DNA profiles, which, the argument goes, exceeds the bare "identification" use of the DNA profiles (the arrestee's name) and, *ipso facto*, results in an unreasonable invasion of the arrestee's privacy. *See People v. Buza*, 197 Cal. App. 4th 1424, 1442, 129 Cal. Rptr. 3d 753 (2011), 129 Cal. Rptr. 3d 753, 771-72. That analysis is fundamentally flawed because it essentially eliminates the legitimacy of the State's interest in solving and preventing sexual (or other major) crimes from the analysis. In the view of these amici, not only is solving sexual crime a cognizable State interest but it should outweigh the privacy interest that one who is properly arrested (that is, with probable cause and for the crimes contained in the Maryland DNA Collection Act), may otherwise have. *See U.S. v. Mitchell*, 652 F.3d 387, 412 (3d Cir. 2011) ("In light of [the] probable cause finding, arrestees possess a diminished expectation of privacy in their own identity, which has traditionally justified taking their fingerprints and photographs.")

II. THE RESTRICTIVE DEFINITION OF "IDENTIFICATION" USED BY THE MARYLAND COURT UNDER GUISE OF PROTECTING PRIVACY IGNORES THE PUBLIC NATURE OF THE ARRESTEE'S CRIMINAL SEXUAL ASSAULT HISTORY AND THE INTERESTS OF SEXUAL ASSAULT SURVIVORS.

Related to its *de facto* conclusion that the State's interest in "solving crimes" has no place in the Fourth Amendment analysis, the Maryland Court of Appeals decided that the State's "identification" interest must be narrowly construed to include only the arrestee's name, address, and physical characteristics, *see King*, 425 Md. at 611. The Maryland Court thus concluded that using the information to determine other identifying data, such as whether the arrestee had been convicted of a crime ("what the person has done," *see King*, 425 Md. at 599), is improper because it "stretches the bounds of reasonableness under our view of the proper Fourth Amendment analysis." *Id.* In drawing this conclusion, the Maryland Court, in common with some other courts, rejected the analogy to fingerprinting, an identification method that has been used for decades to determine what arrestees "have done" as a part of the identification process. *Compare id.* at 595-96 (concluding that fingerprinting is not analogous to DNA collection) and *People v. Buza*, 197 Cal. App. 4th 1424, 1442, 129 Cal. Rptr. 3d 753 (2011) (same) with *Haskell v. Harris*, 669 F.3d 1049, 1059-1063 (9th Cir.), vacated on grant of reh'g *en banc*, 686 F.3d 1121 (9th Cir. 2012) (concluding that there is no principled difference between the two) and *United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1741 (2012) (same).

The courts that come out against the fingerprinting analogy do so by making arguments that do not reach what seems to be the obvious point that there is no conceptual difference between how

fingerprinting and DNA are used in the broader identification process--both are uploaded into databases that provide authorities with the capability of matching the new data with existing data, thereby determining what the arrestee "has done" in the past. *See Mitchell*, 652 F.3d 387 (both DNA and fingerprints are stored and maintained in databases fr m which authorities can seek matches for the purpose of investigating crimes); *Haskell*, 669 F.3d at 1079 (same). Rather, the courts rejecting the analogy argue that DNA is not the equivalent of fingerprinting because DNA samples provide the State with the capability to discover and disclose genetic information, *see, e.g., King* at 596 ("we cannot turn a blind eye to the vast genetic treasure map" found in the DNA), or that the use of the buccal swab is more invasive than the process of extracting fingerprints, *see Mitchell*, 652 F.3d at 424-25 (Rendell, J., dissenting), or, ultimately, that using fingerprints to solve crimes may, itself, be constitutionally infirm but that no court has really looked at the issue in a proper Fourth Amendment environment. *See, e.g., Buza*, 197 Cal. App. 4th 1445, 129 Cal. Rptr. 3d 753 (observing the fingerprinting at arrest "though routine, has never been subjected to Fourth Amendment analysis" because fingerprinting predated the "totality of circumstances" legal construct).

None of those points stands to scrutiny. The first glosses over the fact that the applicable DNA collection laws make misuse of the DNA samples illegal, and the courts that make the point do so by hypothesizing, without support, widespread misuse, *but see, United States v. Kincade*, 379 F.3d 813, 837-

838 (9th Cir. Cal. 2004) (possible misuse not relevant because "courts base decisions not on dramatic Hollywood fantasies, but on concretely particularized facts developed in the cauldron of the adversary process and reduced to an assessable record"). The second point, with respect, seems not to be serious, *see, e.g., King*, 425 Md. at 605 (Barbera, dissenting) (noting that "the buccal swab technique has been described as perhaps the least intrusive of all seizures"). The answer to the third point is more likely that the universal acceptance of arrestee fingerprinting for investigative purposes rests on the soundness of the practice rather than on the unlikely premise that no arrestee has been able to generate a reported opinion that takes a hard look at the issue.

In any event, for these amici identifying what the arrestee "has done" is not only the essential element of identification, but it invades no issue of privacy. What the arrestee "has done" in the past is not private to the arrestee but, rather, is public information, in the extreme. When DNA is placed in the victims' database after a rape or other sexual assault, the donor of that DNA has done something very public--sexually assaulted a member of the public. And the victim/survivor in each case has also done something very public, and, difficult--reported the assault to public officials and submitted themselves to the degrading process of DNA "collection."[18] Unlike the DNA collection from arrestees, which involves the swabbing of the inside

---

[18] Moreover, if the DNA so collected cannot be used to compare to the DNA of arrestees, then the victim has been short-changed.

of the mouth, rape victim/survivors voluntarily submit to extensive, intrusive evidence collection in the hopes of assisting society, stopping a sex offender, and obtaining justice. Sexual assault forensic examinations (SAFEs) require victim/survivors to delay cleansing or relieving themselves after an intimate assault. They require victim/survivors to open their vaginas, anuses, and mouths to intrusive medical instruments for the sake of evidence collection. And they document private and humiliating experiences with photographs and other records.[19] To suggest that the privacy interests of arrestees somehow outweigh the interests of these victim/survivors is to ignore this reality and the interests of sexual assault victim/survivors, primarily women and children.

Moreover, the DNA that is left behind is, as the cases acknowledge, unquestionably abandoned. *See United States v. Davis,* 657 F. Supp. 2d 630, 650 (D. Md. 2009). Thus, the information about what the arrestee "has done" is not something to which the mantle of privacy should attach. As the Fourth Circuit noted regarding fingerprinting,

> [W]hen a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it. We

---

[19] *See* COMAR 10.12.02 (Maryland Dept. Health and Mental Hygiene Regulations on Rape & Sexual Offenses--Physician and Hospital Charges); SAFEta source, Sexual Assault Forensic Examiner Technical Assistance, www.safeta.org/displaycommon.cfm?an=1&subarticlenbr=186 (last visited Dec. 27, 2012).

> accept this proposition because the identification of suspects is relevant not only to solving the crime for which the suspect is arrested, but also for maintaining a permanent record to solve other past and future crimes.

Jones v. Murray, 962 F.2d 1302, 1306 (4th Cir. 1992). As many courts have observed, DNA is the modern-day equivalent of fingerprinting, and using it to identify the arrestee's criminal past invades no interest that needs protection. *See, e.g., Mitchell*, 652 F.3d 387, 401. *See also Anderson v. Virginia*, 274, 469, 650 S.E.2d 702, 705 (Va. 2007) (DNA is a "genetic fingerprint").

III. ARRESTEE DNA COLLECTION PROVIDES AN INVALUABLE TOOL FOR SOLVING AND PREVENTING SEXUAL CRIMES.

Data establish that DNA provides an invaluable tool for law enforcement in identifying perpetrators of sexual assault. For instance, in a California study,[20] DNA profiles of more than 600 backlogged sexual assaults and homicides with sexual components were analyzed. They were

---

[20] *See* Gabriel, Matthew, *et al.*, *Beyond the Cold Hit: Measuring the Impact of the National DNA Data Bank on Public Safety at the City and County Level*, 38 J. L. MED. & ETHICS 396 n.8 (2010). The article noted a lack of in-depth analysis of public safety improvements accomplished through DNA analysis and CODIS. *Id.* at 396. The article analyzed 198 DNA database hits in San Francisco to provide performance metrics that concretely measure the effectiveness of DNA database efforts by local governments. *Id.*

uploaded to CODIS and revealed matches with 110 known DNA profiles of convicted offenders or DNA samples taken in other sexual assault cases.[21] Eighty-five of the matches became cases solved primarily, if not solely, through DNA evidence.[22] Roughly 30% of the 110 matches resulted in some form of legal remedy, such as a guilty plea or conviction by jury trial.[23]

Of the eighty-five sexual perpetrators identified through forensic DNA testing, one offender was linked to five different sex crimes and two others were each linked to three crimes.[24] Eleven offenders were linked to two or more unsolved sexual assaults. These eleven offenders were responsible for a total of twenty-nine detected sex crimes. Due to the initial DNA links, prosecutors were able to obtain jail time for offenders of forty-one percent of the crimes.[25] *See also*, Lisak and Miller, *supra*, 80 (providing data on sexual assault recidivism).

While those statistics show the impact of DNA collection on the resolution of sexual assault cases, a consideration of anecdotes involving real people (both real predators and real victim/survivors) better explain how arrestee DNA collection can and does further the State's interest in solving and preventing sexual assault. Indeed, the legislative history generated when Maryland's DNA Collection Act was

---

21 *Id.* at 399.

22 *Id.*

23 *Id.* at 400.

24 *Id.* at 400.

25 *Id.*

amended in 2009 reveals that the Maryland Legislature had before it many such examples; they also show that the amendment was carefully crafted to address a demonstrable problem--crimes being committed by those who, although frequently arrested, had never been convicted (and, therefore, had not been subject to DNA collection under the Maryland DNA Collection Act as it read at the time).

Over the course of thirty years, Alphonso Hill was arrested over thirty times for rape, sex offenses, kidnapping, assault, and burglary. DNA was taken from Hill on August 13, 2007.[26] Nine days later, CODIS linked Hill's DNA to six unsolved rapes. On August 28, 2007, Hill was charged with six counts of first degree rape, six counts of first degree sex offense, two counts of kidnapping, two counts of perverted practice, six counts of first degree assault, four counts of first degree burglary, sodomy, and several weapons charges. If Maryland had required him to give a DNA sample during his first felony arrest in June 1979, his DNA would have matched DNA obtained from his first felony rape in July 1978, saving seven victims from rapes, sex offenses, and kidnappings.[27]

Leon Copeland committed three rapes between June 1985 and August 1986. Fourteen years later, Copeland was charged with murder and rape in 2000. Four more years later, he was charged

---

[26] *See* H.B. 370 Bill File (2008) (Maryland Study on Preventable Crimes).

[27] *See* H.B. 370 Bill File (2008) (Gov. Martin O'Malley Correspondence to Senator Verna Jones, at 4 (March 4, 2008)).

with another 1986 rape. Between 1986 and 2000, Copeland was arrested five times for violent offenses, but never had his DNA collected, which, had it been collected, likely would have linked him to the rapes sooner.[28]

DNA samples collected from Joseph McInnis in September 2007 linked McInnis to two rapes occurring in Baltimore, Maryland in 1984, leading to his arrest and charges of two counts of 2nd degree rape. In the time between his commission of the 1984 rapes and his arrest in 2007, McInnis was arrested for robbery with a deadly weapon in October 1988, battery in October 1988, battery with a deadly weapon in March 1995, battery with a deadly weapon in September 1995, and assault in December 1995. If DNA had been collected after the first crime of violence in October 1988, then police would have matched McInnis's DNA to the two women who were raped in September 1984, thus solving the rapes four years after the commission, rather than twenty-three years later, and preventing a string of subsequent crimes.[29]

In 1985, Theodore Ronald Reed dragged a woman into the woods at knife point, raped her, cut her throat three times, and left her for dead. The woman survived. The case went cold for twenty years, until a DNA sample in Virginia linked him to

---

[28] *See* H.B. 370 Bill File *supra* note 26. *See also* Timothy B. Wheeler, *O'Malley urges DNA collection*, BALT. SUN, Feb. 14, 2008, http://articles.baltimoresun.com/2008-02-14/news/0802140270_1_dna-samples-taking-dna-dna-databases (last visited Dec. 16, 2012).

[29] *See* H.B. 370 Bill File *supra* note 26.

the crime. Without the DNA, Reed would still be roaming Maryland. Instead, he is serving thirty-two years for rape and attempted murder.[30]

Reports from other jurisdictions echo the powerful impact that DNA collection at the arrest stage has on solving old crimes. The City of Chicago studied the criminal activity of eight individuals and concluded that thirty rapes would have been prevented, in addition to thirty other violent crimes, through DNA collection at the arrest/charge stage.[31] Specifically, DNA collection at the arrest stage would have prevented the following crimes: Andre Crawford would have been prevented from committing ten murders and one rape; Brandon Harris would have prevented from committing four rapes, and one attempted rape/armed robbery/aggravated kidnapping; Geoffrey Griffin would have been prevented from committing eight murders, one rape, and one attempted rape; Mario Villa would have been prevented from committing six rapes and attempted rapes; Bernard Middleton would have been prevented from committing one murder and two rapes; Ronald Macon would have been prevented from committing two murders and one sexual assault; Ronald Harris and Arto Jones would have been prevented from committing eleven rapes and robberies; and Nolan Watson would have been prevented from committing four rapes.[32]

---

[30] *See* H.B. 370 Bill File (2008) (Letter from State's Attorney Glenn F. Ivey to Del. Joseph Vallario, p. 1 (Mar. 12, 2008)).

[31] *See,* Chicago's Study on Preventable Crimes, www.DNAResources.com/policycategories.html.

[32] *Id.*

Bonnie Craig was eighteen years old when she was raped and murdered while walking to school in Anchorage, Alaska. The perpetrator, Kenneth Dion, was a parolee at the time of the rape and murder. He was subsequently arrested for an unrelated parole violation, though his DNA was not taken at arrest and he remained free for an additional thirteen years. He moved to New Hampshire and continued a crime spree of robberies. It was not until he was arrested in 2003 that his DNA finally collected. The DNA sample linked him to the rape and murder of Bonnie Foster.[33]

Juli Busken was a twenty-one year old University of Oklahoma student when she was abducted, forced into her car, raped, and murdered in 1996. Eight years later, the national CODIS database matched the semen found on Busken's clothing to Anthony Sanchez, who had recently been charged with rape and second-degree burglary. In 2006, Sanchez was convicted for the first-degree murder, rape, and sodomy of Juli Busken.[34]

IV. DNA EVIDENCE SURMOUNTS UNIQUE HURDLES INHERENT IN THE PROSECUTION OF SEXUAL ASSAULT AND RAPE.

A. DNA Provides Identification Evidence in Sexual Assault Cases When

---

[33] *See* S.B. 51 Bill File (2008) (Letter from Karen Foster to Norman R. Stone, Jr., p. 1 (Jan. 14, 2008)).

[34] *See* DNASaves, www.dnasaves.org/stories (last visited December 11, 2012).

Eyewitness Identification is Unreliable or Unavailable.

The above anecdotes demonstrate the importance of arrestee DNA collection on the solving of sexual assault crimes where, it appears from the anecdote, the victim/survivor did not know the perpetrator. But rape occurs more often between acquaintances[35] and opponents of DNA collection sometimes use that fact to argue that early DNA collection is not necessary--claiming that there is no "identification" issue in many, if not the majority of, sexual assaults. Indeed, in the 2009 legislative debate regarding the propriety of arrestee DNA collection in Maryland, the ACLU made precisely that point, arguing that DNA collection had little effect on the number of rapes, allegedly because of the frequency of "acquaintance rape."[36] That callous position not only ignores the obvious need for DNA collection in the context of non-acquaintance rape, but also ignores the fact that there are many circumstances when DNA is critical to the prosecution of sexual assault cases, even though the perpetrator may be an "acquaintance" of the victim/survivor.

---

[35] *See* Rape, Abuse, Incest Network, http://www.rainn.org/get-information/statistics/sexual-assault-victims (last visited Dec. 12, 2012) (citing U.S. Bureau of Justice Statistics, *Sexual Assault of Young Children as Reported to Law Enforcement* (2000)). Ninety-three percent of juvenile sexual assault victims know their attacker. Approximately 34% of juvenile victims were assaulted by a family member. *Id.* Approximately 59% of juvenile victims were acquaintances with their attacker. *Id.*

[36] *See* H.B. 370 Bill File (2008) (ACLU Testimony for the House Judiciary Committee, Opposition to H.B. 370, *Myths & Facts About DNA Databanks* (Feb. 13, 2008)).

For instance, the psychological impact of rape can make the victim/survivors incapable of reporting the crime and identifying the perpetrator.[37] In cases of sexual assault of children,[38] victim/survivors often cannot competently identify even "acquaintances." Rape and sexual assaults of elderly people in nursing homes[39] often involve victim/survivors who are not competent to make eyewitness identification (or whose competency can be challenged). In cases where the victim has been murdered by the acquaintance, the only competent evidence is likely to be DNA evidence.[40] In all of those cases, DNA can

---

[37] *See* Robin R. Runge, *Failing to Address Sexual and Domestic Violence at Work: The Case of Migrant Farmworker Women*, 20 AM. U. J. GENDER SOC. POL'Y & L. 871, 893-94 (2012) (stating that only 16% to 19% of rapes are reported to police and explaining that women do not report sexual assault because they blame themselves, experience guilt, fear of stigma, fear of not being believed, fear her partner's response, fear upsetting her children, and concern about perception in the community).

[38] *See Missouri v. Dickson*, 337 S.W.3d 733 (Mo. Ct. App. 2011) (affirming child kidnapping, forcible rape and forcible sodomy conviction, notwithstanding inconsistent testimony of seven year-old victim, where DNA evidence bolstered testimony).

[39] *See* Lisa Tripp, *The Medico-Legal Aspects of Dementia-Driven Sexual Abuse in Nursing Homes*, 12 MARQEA 363, 363-66 (Spring 2011) (describing a nursing home incident where one resident with dementia was observed sexually assaulting a second resident with dementia and neither resident reported a recollection of the assault).

[40] Christina Ng & Abbie Boudreau, *et al.*, murdered Barista Whitney Heichel was raped, shot several times, Oct. 22, 2012, http://abcnews.go.com/US/murdered-barista-Whitney-heichel-raped-shot-times/story?id=17534209 (last visited Dec. 18, 2012) (DNA evidence recovered from the crime scene lead police to

provide the link to the perpetrator that the victim is unable to supply. Finally, in cases where victim/survivors are reluctant to testify out of concern that they will not be believed,[41] the ability of a prosecutor to bolster the victim/survivors' eyewitness testimony with DNA evidence can provide the comfort the victim/survivors may need to go forward.[42]

B. Juries Expect Prosecutors to Present DNA Evidence in Sexual Assault Cases.

DNA evidence is particularly important to sexual assault victims because, plainly put, the modern jury expects DNA evidence in the prosecution of a rape. A recent study revealed that nearly 90% of jurors expect to see DNA evidence in rape cases.[43] This jury expectation for rape cases is striking when considering that surveyed jurors did not have the same expectations for the prosecution of other crimes. For instance, about 48% of jurors expected to receive DNA evidence in assault cases. About 32% of jurors expected DNA evidence in breaking-and-entering cases. Only a little over 24% of jurors expected DNA evidence in theft cases.[44] Thus, the expectation that DNA evidence be available and used by the prosecution is particularly high for rape cases.

---

arrest the victim's acquaintance and neighbor in connection with her rape and murder).

[41] *See* Runge, *supra*, note 37.

[42] *See* Runge, *supra*, note 37 (noting that women are often reluctant to report rape for fear of not being believed).

[43] *Id.*

[44] *Id.*

When prosecutors fail to satisfy a juror's expectation that there be DNA evidence, juries are less likely to convict defendants charged with rape. When the prosecution relies on the rape complainant or other witnesses, but does not present DNA evidence, almost 25% of jurors indicate a likely verdict of not guilty.[45]

CONCLUSION

Arrestee DNA collection demonstrably solves sexual assault cases and can prevent future such crimes. The privacy implication for those who have been arrested based on probable cause is minimal--the "intrusion" itself is *de minimis* and the use of the DNA to discover what the arrestee "has done" in the past is no different than the use made of fingerprints. In contrast, the State's interests (which are also the interests of these amici) are compelling and predominant. The judgment of the Maryland Court of Appeals should be reversed and the conviction of Alonzo Jay King, Jr. reinstated.

---

[45] *Id.* at 21.

Respectfully submitted,

William C. Sammons*
Kristin P. Herber
Lydia S. Hu
Tydings & Rosenberg LLP
100 East Pratt Street, 26th Floor
Baltimore, Maryland 21202
(410) 752-9700
wsammons@tydingslaw.com

Counsel for Amici Curiae
*Counsel of Record

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JAN 2 - 2013
OFFICE OF THE CLERK

No. 12-207

IN THE
Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

ALONZO JAY KING, JR.,
Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF FOR THE MARYLAND CRIME VICTIMS' RESOURCE CENTER, INC., NATIONAL CENTER FOR VICTIMS OF CRIME, NATIONAL CRIME VICTIM LAW INSTITUTE, NATIONAL ORGANIZATION OF PARENTS OF MURDERED CHILDREN, INC., CRIME VICTIMS UNITED OF CALIFORNIA, D.C. CRIME VICTIMS' RESOURCE CENTER, AND COLORADO ORGANIZATION FOR VICTIM ASSISTANCE AS AMICI CURIAE IN SUPPORT OF PETITIONER

JULIE A. GROHOVSKY
SHANLON WU
WU, GROHOVSKY & WHIPPLE, P.L.L.C.
1300 Pennsylvania Ave., N.W.
Suite 700
Washington, D.C. 20004
(202) 204-3053

NEAL KUMAR KATYAL
Counsel of Record
DOMINIC F. PERELLA
LISA SWARTZFAGER*
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5528
neal.katyal@hoganlovells.com

Counsel for Amici Curiae

**Admitted only in Va.; supervised by members of D.C. Bar.*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. DNA COLLECTION LAWS HAVE A FAR-REACHING IMPACT ON VICTIMS AND POTENTIAL VICTIMS 5

A. Jerry's Story 5

B. Nineteen Avoidable Victims 7

C. Laura's Story 10

II. THE STATE'S INTEREST IN SAFEGUARDING CRIME VICTIMS AND PROTECTING THE INNOCENT FAR OUTWEIGHS THE SLIGHT INTRUSION OF A DNA SAMPLE 12

A. Protection Of Victims, And Respect For Victims' Dignity, Are Crucial Government Interests 12

B. Collecting DNA Samples From Arrestees Advances These Governmental Interests 16

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases:

Anderson v. *Virginia*,
650 S.E.2d 702 (Va. 2007) 11

Calderon v. *Thompson*,
523 U.S. 538 (1998) 17

Cianos v. *Maryland*,
659 A.2d 291 (1995) 15

Kenna v. *United States Dist. Court*, 435
F.3d 1011 (9th Cir. 2006) 15

Maryland v. *Craig*,
497 U.S. 836 (1990) 13, 15

Morris v. *Slappy*,
461 U.S. 1 (1983) 13

New Jersey v. *J.G.*,
701 A.3d 1260 (N.J. 1997) 13

Payne v. *Tennessee*,
501 U.S. 808 (1991) 12, 13

Roberts v. *United States Jaycees*,
468 U.S. 609 (1984) 15, 16

Simon & Schuster, Inc. v. *Members of N.Y. State Crime Victims Bd.*, 502
U.S. 105 (1991) 13, 15

State v. *Korsen*,
111 P.3d 130 (Idaho 2005) 17

United States v. *Amerson*,
483 F.3d 73 (2d Cir. 2007) 19

United States v. *Knights*,
534 U.S. 112 (2001) 12

TABLE OF AUTHORITIES—Continued

Page

United States v. *Kincaid*, 379 F.3d 813 (9th Cir. 2004) (en banc) ... 17, 19

United States v. *Salerno*, 481 U.S. 739 (1987) ... 18

Washington v. *Dias*, No. 63826-2-I, 2009 WL 3723802 (Wash. Ct. App. Nov. 9, 2009) (unpublished) ... 7, 8

Constitutional Provision:

Md. Const. art. 47(a) ... 14

Statutes:

18 U.S.C. § 3771 ... 15

18 U.S.C. § 3771(a) ... 14

18 U.S.C. § 3771(a)(8) ... 14

18 U.S.C. § 3771(b) ... 15

18 U.S.C. § 3771(d)(1) ... 15

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ... 14

Md. Code Ann., Crim. Proc. tit. 11 ... 15

Md. Code Ann., Crim. Proc. § 11-103(e)(1) ... 15

Md. Code Ann., Crim. Proc. § 11-603(b) ... 15

Victims of Crime Act of 1984, Pub. L. No. 98-473, 98 Stat. 2170 (1984) (codified in part at 42 U.S.C. §§ 10601 to 10605) ... 14

TABLE OF AUTHORITIES—Continued

Page

Victims Rights Clarification Act of 1997, Pub. L. No. 105-6, 111 Stat. 12 (1997) 14

Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1815 (1994) (codified as amended at 42 U.S.C. §§ 13701-14223) 14

Other Authorities:

Akhil R. Amar, *A Search for Justice in Our Genes*, N.Y. Times, May 7, 2002 19

N. Brodeur, Column, *One Chilling Reason to Pass DNA Law*, The Seattle Times, Feb. 9, 2012 7

California Department of Justice, *BFS DNA Frequently Asked Questions: Effects of the All Adult Arrestee Provision* 16

California Department of Justice, *Proposition 69 DNA Data Bank Program Report for Second Quarter 2012* 16

Chicago's Study on Preventable Crimes (2005) 11

J. Cronan, *The Next Frontier of Law Enforcement: A Proposal for Complete DNA Databanks*, 28 Am. J. Crim. L. 119, 151 (2000) 18

Facts on Post-Conviction DNA Exonerations, Innocence Project (2012) 19

TABLE OF AUTHORITIES—Continued

Page

D. Fetsco, *Unpaid Restitution: An Under-Enforced Right of Victims and Suggestions to Improve the Collection of Restitution in Wyoming*, 12 Wyo. L. Rev. 367 (2012) 14

T. Hargrove, *Nearly 185,000 Homicides Since 1980 Remain Unsolved*, Scripps News (May 25, 2010) 4

D. Hinkel, *Lake County Announces New Arrests In Killings Once Linked To Other Men*, The Chicago Tribune (May 15, 2012) 6

D. Hinkel & L. Black, *Hobbs Freed After Five Years In Jail On Murder Charges*, The Chicago Tribune, Aug. 4, 2010 ..... 5, 6

T. Jackman, *Man Convicted Of 1991 Rape In Va. Park*, Wash. Post, Nov. 24, 2004 10

T. Jackman & J. White, *Arlington Rape Suspect's DNA Linked To Slayings Of 2 Illinois Girls In 2005*, Wash. Post, July 9, 2010 6

G. Johnson, *Washington Considers Collecting DNA Upon Arrest In Serious Crime*, The Seattle Times, Feb. 5, 2012 7

KOMO News Services, *Serial Rapist Gets 227-year Prison Sentence* (Nov. 20, 2008) 9

TABLE OF AUTHORITIES—Continued

Page

KOMO News Services, *Serial Rapist Sentenced In King County Attacks*, Sept. 19, 2008 8

Maryland Study on Preventable Crimes 11

C. Nicholas, Letter to the Editor, *DNA: Protect Potential Victims From 'Intrusion'*, The News Tribune, Feb. 8, 2012 9

N. Singer, *Serial Rapist Sentenced To 36 Years In Prison*, The Seattle Times, Sept. 19, 2008 ..... 8, 9

United States Sentencing Commission, *Recidivism and the "First Offender"* (2004) 18

Virginia Department of Forensic Science, *DNA Databank Statistics* 16

J. White, *Marine Held In 1 Ballston Case Is Target In Probe Of Weekend Rape*, Wash. Post, March 1, 2010 6

IN THE

Supreme Court of the United States

No. 12-207

STATE OF MARYLAND,

Petitioner,

v.

ALONZO JAY KING, JR.,

Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF FOR THE MARYLAND CRIME VICTIMS' RESOURCE CENTER, INC., NATIONAL CENTER FOR VICTIMS OF CRIME, NATIONAL CRIME VICTIM LAW INSTITUTE, NATIONAL ORGANIZATION OF PARENTS OF MURDERED CHILDREN, INC., CRIME VICTIMS UNITED OF CALIFORNIA, D.C. CRIME VICTIMS' RESOURCE CENTER, AND COLORADO ORGANIZATION FOR VICTIM ASSISTANCE AS AMICI CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST[1]

The above-named victims' rights organizations respectfully submit this brief as *amici curiae*. Together, they have a deep interest in ensuring that

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae*, its members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have given their consent to this filing in letters that have been lodged with the Clerk.

crime victims' voices are heard by our federal and state courts.

The Maryland Crime Victims' Resource Center, Inc. is a statewide nonprofit organization dedicated to serving the interests of crime victims. Its mission is to ensure that victims of crime receive justice and are treated with dignity and compassion. Its diversified services include criminal-justice education, court accompaniment, counseling, support groups, legal information and representation, and policy advocacy.

The National Center for Victims of Crime is a nonprofit organization that advocates for victims' rights, trains professionals who work with victims, and serves as a source of information on victims' issues. The Center is committed to advancing victims' rights and helping victims of crime rebuild their lives.

The National Crime Victim Law Institute ("NCVLI") is a nonprofit educational and advocacy organization located at Lewis & Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; technical assistance to attorneys; promotion of the National Alliance of Victims' Rights Attorneys; research and analysis of developments in crime victim law; and provision of information on crime victim law to crime victims and other members of the public. In addition, NCVLI routinely participates as *amicus curiae* in state and federal cases involving crime victims' rights nationwide.

The National Organization of Parents of Murdered Children, Inc. is a self-help group dedicated to help-

ing the families and friends of those who have lost their lives to violence. The organization provides ongoing support and assistance to survivors of homicide victims and works to create a world free of murder. Founded in 1978, POMC now has more than 60 chapters throughout the United States, all offering support groups and other resources to those whose loved ones have died by violence.

Crime Victims United of California uses education, legislative advocacy, and political action to enhance public safety, promote crime-reduction measures, and strengthen the rights of crime victims.

The D.C. Crime Victims' Resource Center provides pro bono legal support for the assertion and enforcement of victims' rights in the District of Columbia.

The Colorado Organization for Victim Assistance is committed to fairness and healing for crime victims, their families, and communities through leadership, education, and advocacy.

Proper resolution of this case is a matter of great concern to *amici*. Their many members have each been affected by crime in unique ways, but they are bound by their common suffering. Laws allowing the collection of DNA from arrestees have the power to prevent many others from experiencing the same loss. This Court should recognize that the state's interest in affording justice, finality, and a voice to crime victims—not to mention preventing crime and avoiding wrongful convictions—substantially outweighs the minimal intrusion to an arrestee in providing a DNA sample.

SUMMARY OF ARGUMENT

The court below incorrectly held that a law allowing the collection of DNA from arrestees violates the Fourth Amendment. In fact, the critical government interests served by DNA collection far outweigh the minimal intrusion imposed on arrestees. Most obviously, as Petitioner has argued, the collection of DNA from arrestees advances the government interest in preventing crime. *Amici* seek to focus the Court on a related, no less fundamental, interest advanced by such laws: the interest in safeguarding the rights of crime victims.

The collection of DNA from arrestees protects victims, and advances their interests, in crucial ways. Most importantly, it prevents countless people from becoming victims in the first place. It is impossible to overstate the real-world significance of that fact. Every single violent crime prevented means another life undamaged and another family unscarred. There is no doubt that DNA-collection statutes have prevented many violent crimes and will prevent many thousands more.

Routine DNA collection from arrestees also advances other interests of crime victims. It increases the chances that a criminal will be caught, providing victims and their loved ones with peace of mind that the perpetrator is not on the loose. That is no small benefit in a nation where a shocking *185,000* homicides went unsolved between 1980 and 2008.[2] DNA arrestee laws also promote the government's interest in providing victims with finality, justice, and a

---

[2] T. Hargrove, *Nearly 185,000 Homicides Since 1980 Remain Unsolved*, Scripps News, May 25, 2010, http://www.scrippsnews.com/node/54012.

voice. And they further the government's interest in preventing wrongful convictions—an interest that advances the rights of defendants and victims alike, as no victim wants to live with the possibility that the wrong person was punished for the crime.

In short, collecting DNA from arrestees makes it easier for the state to ensure that victims and their families receive the fairness, respect, and dignity they deserve. These state interests in protecting victims, when added to the state's already weighty interests in favor of DNA collection from arrestees, require that the decision below be reversed.

ARGUMENT

I. DNA COLLECTION LAWS HAVE A FAR-REACHING IMPACT ON VICTIMS AND POTENTIAL VICTIMS.

Various *amici* have provided the Court with data illustrating the effectiveness of DNA-collection statutes in preventing crime. Those data are an important, and compelling, part of the picture. But dry numbers can obscure the visceral reality at the heart of this case: DNA collection statutes prevent real people—and their husbands, wives, fathers, mothers, children, and other loved ones—from suffering indescribable pain. Those victims' stories are, quite frankly, hard to hear. But they are important for this Court to consider.

A. Jerry's Story

In May 2005, Jerry Hobbs discovered the unimaginable in a park near his home in Illinois: the mutilated bodies of his daughter, Laura, 8, and her friend Krystal Tobias, 9. D. Hinkel & L. Black, *Hobbs Freed After Five Years In Jail On Murder Charges*,

The Chicago Tribune, Aug. 4, 2010.[3] But the horror was compounded when Jerry himself was arrested for the crimes and charged with murder. Prosecutors vowed to seek the death penalty. T. Jackman & J. White, *Arlington Rape Suspect's DNA Linked To Slayings Of 2 Illinois Girls In 2005*, Wash. Post, July 9, 2010.[4] Jerry Hobbs spent five years in jail awaiting trial. *Id.*

In February 2010, Jorge Torrez was arrested in Virginia on abduction and robbery charges. J. White, *Marine Held In 1 Ballston Case Is Target In Probe Of Weekend Rape*, Wash. Post, March 1, 2010.[5] Pursuant to Virginia's arrestee DNA law, Torrez gave a DNA sample, which was entered into the national databank. Jackman & White, *supra*. That DNA matched semen recovered from the scene of Laura and Krystal's slayings. *Id.*

Thanks to Virginia's DNA arrestee law, after five years behind bars, Jerry Hobbs was freed. Hinkel & Black, *supra*. When he first learned of the link to Torrez's DNA evidence, his first thought was not of freedom, but of his daughter. *Id.* His lawyer told the press, "The first thing that he said was not, 'Get me out of here.' It was, 'Make sure that we do justice for Laura.'" *Id.*

Jerry is now one step closer to seeing justice done. In May 2012, prosecutors charged Torrez with mur-

---

[3] *Available at* http://articles.chicagotribune.com/2010-08-04/news/ct-met-jerry-hobbs-hearing-0805-20100804_1_dna-evidence-murder-charges-jerry-hobbs.

[4] *Available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/07/08/AR2010070805703.html.

[5] *Available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/02/27/AR2010022701651.html.

dering Laura and Krystal, largely on the strength of the DNA evidence. D. Hinkel, *Lake County Announces New Arrests In Killings Once Linked To Other Men*, The Chicago Tribune (May 15, 2012).[6] Had Virginia not had an arrestee DNA law, Jerry Hobbs would still be in jail, facing a potential death sentence for his daughter's murder.

B. Nineteen Avoidable Victims

On July 31, 2005, police arrested Anthony Dias for a felony hit-and-run in Pierce County, Washington. *See* G. Johnson, *Washington Considers Collecting DNA Upon Arrest In Serious Crime*, The Seattle Times, Feb. 5, 2012.[7] He was booked and eventually released on bail. *Id.* Police did not obtain a DNA sample from Dias before his release because weeks earlier, in July 2005, the Washington legislature had voted down a measure that would have allowed DNA collection from those arrested for serious felonies. N. Brodeur, Column, *One Chilling Reason to Pass DNA Law*, The Seattle Times, Feb. 9, 2012.[8]

As it turns out, the fact that Dias' DNA was not collected made it possible for him to unleash a reign of terror on women and girls in the area that would last nearly a year. A month after his arrest, Dias raped a 19 year-old woman in her bedroom. *See Washington* v. *Dias*, No. 63826-2-I, 2009 WL

---

[6] *Available at* http://articles.chicagotribune.com/2012-05-15/news/chi-lake-county-announces-new-arrests-in-killings-of-laura-hobbs-and-krystal-tobias-as-well-as-fred-reckling-all-once-linked-to-other-men-20120515_1_dna-evidence-jorge-torrez-reckling-case.

[7] *Available at* http://seattletimes.com/html/localnews/2017435042_ 'na06m.html.

[8] *Available at* http://seattletimes.com/html/nicolebrodeur/2017470143_nicole10m.html.

3723802, at *1 (Wash. Ct. App. Nov. 9, 2009) (unpublished). Dias threatened the woman and her family with a gun and forced her to remove her clothes. *Id.* He hit her in the head with the gun, kicked her, and bit her breasts. *Id.* He pointed the gun at her head and put it into her mouth and vagina. *Id.* And he repeatedly raped her orally, anally, and vaginally.

Police collected the perpetrator's DNA from the scene and victim. *Id.* But because Dias' DNA was not in the DNA databank system, the police did not get a hit. Dias remained free. And that allowed him to rape five more women and girls in front of helpless friends and family in the months that followed.

In the first preventable incident, Dias tied up Charisa Nicholas and another woman, forcing them to watch as he raped their roommate. *See* Johnson, *supra*; *Dias*, 2009 WL 3723802, at *2-3. After raping the woman, Dias tried to erase the evidence of his crimes by forcing his victim to shower and making her brush her teeth. *See Dias*, 2009 WL 3723802, at *2. Police nonetheless recovered DNA from the crime scene. *Id.* at *3.

Dias next raped two sisters while six other people in the residence—including the two victims' mother, a two-year-old girl, and an 11-year-old boy—were tied up with duct tape. N. Singer, *Serial Rapist Sentenced To 36 Years In Prison*, The Seattle Times, Sept. 19, 2008.[9] One of the sisters wrote a letter that her friend read in court. She told the trial judge: "For me and my sister life will never be the same. It's like a scar that will never go away." KOMO

---

[9] *Available at* http://seattletimes.com/html/localnews/2008191531_dias20m0.html.

News Services, *Serial Rapist Sentenced In King County Attacks*, Sept. 19, 2008.[10] The sisters' mother, who was bound and forced to watch the rapes, *id.*, told the court through her sobs that "[d]uring those four or five hours, [Dias] killed something in each of us." Singer, *supra*. She still sleeps in the living room every night out of fear that someone will come into her home and harm her children. *Id.*

In the last of his preventable crimes, Dias tied up a woman with a dog leash and duct tape and then raped her two daughters, ages 13 and 15. *Id.* His rape spree finally ended when police caught him after that attack. *Id.* He was convicted in 2008 and sentenced to 227 years in prison. *See* KOMO News Services, *Serial Rapist Gets 227-year Prison Sentence* (Nov. 20, 2008).[11]

Had authorities collected DNA from Dias when he was arrested in July 2005, he likely would have been identified—and hopefully caught—after his first rape, not his sixth. Charisa Nicholas, one of the first victims, wrote: "The preventable story of Anthony Dias' 2005 crime rampage is not just words on paper. His 19 victims each have names and faces, lives that were shattered, families and friends who were helpless to offer comfort." C. Nicholas, Letter to the Editor, *DNA: Protect Potential Victims From 'Intrusion'*, The News Tribune, Feb. 8, 2012.[12]

---

[10] *Available at* http://www.komonews.com/news/local/28660234.htm.

[11] *Available at* http://www.komonews.com/news/local/19220409.html.

[12] *Available at* http://blog.thenewstribune.com/letters/2012/02/08/dna-bill-not-seen-as-%e2%80%9crush-to-expand%e2%80%9d-by-victims/.

C. Laura's Story

Laura Berry had a phobia of driving. And so on July 23, 1991, she was walking as she usually did toward the elementary school where she was a teaching assistant. T. Jackman, *Man Convicted Of 1991 Rape In Va. Park*, Wash. Post, Nov. 24, 2004.[13] Out of the blue, a man grabbed Laura from behind and yanked her over an embankment. *Id.* He raped and sodomized her. *Id.* He then took her $63, money she had planned to use that day for her first driving lesson, and left her sobbing in the dirt. *Id.*

Laura "was afraid to walk around [her] neighborhood" for a year after the attack. *Id.* For more than a decade, when she saw men who resembled the glimpse she had gotten of her attacker, she wondered, 'Could it be him?' " *Id.* Thanks to a DNA arrestee law, Laura no longer has to wonder. A man named Angel Anderson was arrested on similar rape and sodomy charges in 2003. *Id.* Police obtained a DNA sample from him under a new Virginia law. *Id.* And when investigators working on Laura Berry's cold case submitted evidence from her crime scene to the DNA system that fall, they got a hit—Anderson had raped her more than a dozen years earlier. *Id.*

Because of the DNA evidence, Anderson was successfully prosecuted for his crimes against Laura Berry. *Id.* Laura testified at Anderson's trial. *Id.* The jury deliberated for less than three hours before convicting him of rape, forcible sodomy, and robbery, *id.*, and the Virginia Supreme Court upheld the

---

[13] *Available at* http://www.washingtonpost.com/wp-dyn/articles/A8668-2004Nov23.html.

conviction on appeal. *See Anderson* v. *Virginia*, 650 S.E.2d 702 (Va. 2007).

The DNA-collection statute helped Laura Berry obtain the closure she had long sought. But there is another twist to her case: Anderson, it turns out, was first arrested for and convicted of rape in 1979. Jackman, *supra*. If routine DNA collection had occurred at the time, and Virginia had had its current DNA-collection statute in place when Laura was attacked, Anderson likely would have been identified, and hopefully arrested, in 1991. Laura could have avoided years spent wondering if men she saw on the street might be her rapist. And the woman Anderson attacked in 2003 could have been spared her harrowing ordeal.

* * *

Stories like these are no anomalies; it is a fact that DNA arrestee statutes prevent crime and avoid wrongful convictions. To take just two examples: A study by the City of Chicago identified 60 violent crimes, including 53 murders and rapes, that would have been prevented if Illinois had taken DNA samples from persons arrested for felony crimes. *Chicago's Study on Preventable Crimes* (2005).[14] And a Maryland study of the criminal histories for just *three* offenders revealed that had Maryland enacted its DNA arrestee law earlier, 20 crimes, including rapes, robberies, and a murder, would have been prevented. *Maryland Study on Preventable Crimes*.[15]

---

[14] *Available at* http://www.denverda.org/DNA_Documents/Chicago%20Preventable%20Crimes%20-%20DNA.pdf.

[15] *Available at* http://www.dnasaves.org/files/MarylandDNAarresteestudy.pdf.

Such numbers are only the tip of the iceberg. That is why the positive impact of DNA arrestee laws is immense. The chain reaction caused by acts of violent crime devastates families, communities, and society. Each case of violent crime prevented changes many lives—not just the would-be victim's, but also those of the victim's family members and loved ones who are spared unthinkable loss.

DNA arrestee laws cannot, of course, prevent all violent crime. But they can prevent many crimes, and break the ensuing chain reactions.

II. THE STATE'S INTEREST IN SAFEGUARDING CRIME VICTIMS AND PROTECTING THE INNOCENT FAR OUTWEIGHS THE SLIGHT INTRUSION OF A DNA SAMPLE.

"The touchstone of the Fourth Amendment is reasonableness." *United States* v. *Knights*, 534 U.S. 112, 118 (2001). In a case such as this one, that means the Court balances the degree to which a search intrudes upon an individual's privacy with the degree to which it promotes legitimate governmental interests. *Id.* at 118-119. The incidents described above illustrate why DNA evidence is crucial—and why the state's profound interest in preventing crime, protecting crime victims, and exonerating the wrongly accused far outweighs the minimal intrusion to an arrestee in providing a DNA sample.

A. Protection Of Victims, And Respect For Victims' Dignity, Are Crucial Government Interests.

1. "Justice, though due to the accused, is due to the accuser also." *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). This Court has long recognized as much, and

accordingly has reaffirmed the fundamental government interest in protecting crime victims and respecting their concerns. The Court explained in *Morris* v. *Slappy*, 461 U.S. 1, 14-15 (1983), that "in the administration of criminal justice, courts may not ignore the concerns of victims." Accordingly, the Court has held that the government has a compelling interest to ensure that victims are compensated by criminals who harm them. *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 123 (1991). It has found that the state has an interest in protecting rape victims against unwarranted invasions of privacy and harassment. *Michigan* v. *Lucas*, 500 U.S. 145, 149-50 (1991). It has held that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some instances, a defendant's right to face his or her accusers in court." *Maryland* v. *Craig*, 497 U.S. 836, 854 (1990). And it has upheld the introduction of victim impact evidence at capital sentencing proceedings. *Payne*, 501 U.S. at 823-827. In so doing, the Court recognized "*each* victim's uniqueness as an individual human being" and explained that "the victim is an individual whose death represents a unique loss to society and in particular to his family." *Id.* (internal quotations omitted).

2. Congress and states across the country have reached the same conclusions and, increasingly in recent decades, have enshrined them into law. *See Payne*, 501 U.S. at 834 (Scalia, J., concurring) (noting the development of "a public sense of justice keen enough that it has found voice in a nationwide 'victims' rights' movement"); *New Jersey* v. *J.G.*, 701 A.3d 1260, 1268 (N.J. 1997) ("Although the needs of

crime victims have long been a particular concern of government, in recent years, at both the federal and state level, there has been a heightened awareness of victims' rights."). Congress has enacted multiple statutes that protect victims' rights and interests. *See, e.g.*, Victims of Crime Act of 1984, Pub. L. No. 98-473, 98 Stat. 2170 (1984) (codified in part at 42 U.S.C. §§ 10601 to 10605); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1815 (1994) (codified as amended at 42 U.S.C. §§ 13701-14223); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); Victims Rights Clarification Act of 1997, Pub. L. No. 105-6, 111 Stat. 12 (1997). Among them is the 2004 Crime Victims' Rights Act, which expressly gives victims the rights to be "reasonably protected from the accused" and "treated with fairness and with respect for the victim's dignity and privacy" in the federal justice system. 18 U.S.C. § 3771(a). Moreover, every state has enacted laws protecting crime victims' rights, and at least 33 states have chiseled these rights into their constitutions. *See* D. Fetsco, *Unpaid Restitution: An Under-Enforced Right of Victims and Suggestions to Improve the Collection of Restitution in Wyoming*, 12 Wyo. L. Rev. 367, 373 (2012).

These laws express the government's interest in promoting at least three important overarching interests: fairness to victims, respect for victims, and dignity of victims. *See* 18 U.S.C. § 3771(a)(8); Md. Const. art. 47(a) (crime victims "shall be treated by agents of the State with dignity, respect, and sensitivity during all phases of the criminal justice process"). Those interests are reflected in victims' rights of participation, protection, and privacy at every

procedural stage of the criminal process, from the investigation procedure through parole hearings. *See, e.g.*, 18 U.S.C. § 3771; Md. Code Ann., Crim. Proc. tit. 11; *see Kenna* v. *United States Dist. Court*, 435 F.3d 1011, 1013 (9th Cir. 2006) ("The Crime Victims' Rights Act sought to * * * mak[e] victims independent participants in the criminal justice process.").

Underscoring the strength of the governmental interest at stake, Congress and the states do not just passively declare that victims have rights; they instead require courts to affirmatively ensure that victims are afforded their statutory rights. *See, e.g.*, 18 U.S.C. § 3771(b); Md. Code Ann., Crim. Proc. § 11-103(e)(1); *see also Cianos* v. *Maryland*, 659 A.2d 291, 295 (1995) ("[T]rial judges *must* give appropriate consideration to the impact of crime upon the victims.") Indeed, in the federal system and in Maryland, among others, the government itself may assert crime victims' rights in criminal proceedings. *See* 18 U.S.C. § 3771(d)(1); Md. Code Ann., Crim. Proc. § 11-603(b) (providing that the victim or the state may request restitution for the victim).

Throughout the nation, in short, lawmakers recognize protection of victims and respect for victims' concerns as crucial governmental interests. That statutory consensus is highly relevant because the Court has long regarded a national consensus as proof that a government interest is compelling. *See, e.g., Simon & Schuster,* 502 U.S. at 118 (compelling interest "in ensuring that victims of crime are compensated by those who harm them" evidenced by fact that "[e]very State has a body of tort law serving exactly this interest"); *Craig*, 497 U.S. at 853; *Roberts* v. *United States Jaycees*, 468 U.S. 609, 624-625

(1984). There is such a consensus here. That cannot be overlooked in conducting the Fourth Amendment balancing test.

B. Collecting DNA Samples From Arrestees Advances These Governmental Interests.

The collection of DNA from arrestees advances these governmental interests in several crucial ways.

1. Collecting DNA evidence from arrestees increases the chances that violent criminals will be caught and prosecuted. That proposition is intuitively obvious, but the data bear it out. Virginia, for example, has had a DNA arrestee law since 2000. As of October 31, 2012, 785 "hits" on that database—i.e., instances when evidence collected from a crime scene matched DNA on file—were directly attributable to arrestees. *See* Virginia Department of Forensic Science, *DNA Databank Statistics.*[16] Likewise, California's database has received a total of 22,400 DNA hits as of June 30, 2012. California Department of Justice, *Proposition 69 DNA Data Bank Program Report for Second Quarter 2012.*[17] More than 24,000 investigations have been aided by these hits. *Id.* And a sample from January 1 through July 31, 2011, revealed that fully 30 percent of the hits were directly attributable to adult felony arrestees. California Department of Justice, *BFS DNA Frequently Asked Questions: Effects of the All Adult Arrestee Provision.*[18]

---

[16] *Available at* http://oag.ca.gov/sites/all/files/pdfs/bfs/quarterlyrpt.pdf?

[17] *Available at* http://www.dfs.virginia.gov/statistics/index.cfm.

[18] *Available at* http://oag.ca.gov/bfs/prop69/faqs.

Not every one of these hits leads to an arrest, of course. But many do. The resulting trials and punishment take a criminal off the streets and prevent other individuals from falling victim to violent crime, as the stories above illustrate. They also promote the government's interest in providing victims with finality and justice. As this Court has recognized, "[o]nly with real finality can the victims of crime move forward knowing the moral judgment will be carried out." *Calderon* v. *Thompson*, 523 U.S. 538, 556 (1998). By contrast, a persistent absence of finality "inflict[s] a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victims of crime alike." *Id.* (internal quotations omitted); *see also State* v. *Korsen*, 111 P.3d 130, 135 (Idaho 2005) ("[A]batement of [a] conviction would deny the victim of the fairness, respect and dignity guaranteed by [state] laws by preventing the finality and closure they are designed to provide."). In the United States, where a shocking *185,000* homicides went unsolved between 1980 to 2008, *see supra* at 4, that absence of finality is an epidemic. Routine arrestee DNA collection can help make a dent in this massive national problem. As the en banc Ninth Circuit put it: "[B]y contributing to the solution of past crimes, DNA profiling of qualified federal offenders helps bring closure to countless victims of crime who long have languished in the knowledge that perpetrators remain at large." *United States* v. *Kincaid*, 379 F.3d 813, 839 (9th Cir. 2004) (en banc).

2. DNA arrestee laws also prevent violent crimes from happening in the first place—and thus prevent people from becoming victims of those crimes. The simple fact is that many people arrested for crimes

go on to commit other offenses; as the United States Sentencing Commission put it, "arrests without convictions are predictive of re-offending behavior." United States Sentencing Commission, *Recidivism and the "First Offender"* 15 (2004);[19] *see id.* at 12-14 (17 percent of individuals with prior arrests are arrested again or convicted of another crime within two years). If those individuals' DNA is on file, they can be identified, and in many cases apprehended, the first time they re-offend. There is no question that that means fewer crimes and fewer crime sprees. *See supra* at 7-9, 11. And the prevention of violent crime unquestionably constitutes a governmental interest of the first order. As this Court explained in *United States* v. *Salerno*, 481 U.S. 739 (1987), "a concern for the safety and indeed the lives of its citizens" is a "primary concern of every government." *Id.* at 750. That is why "the Government's general interest in preventing crime is compelling." *Id.* at 754.

3. DNA laws further promote the interests of crime victims and "collateral" crime victims—those wrongfully accused of crimes—by making police identification procedures more reliable.

For starters, such laws prevent many innocent individuals from ever becoming suspects. One study showed that between 1989 and 2000 forensic DNA analysis excluded the primary suspects in approximately *25 percent* of the sexual assault cases referred to the FBI. *See* J. Cronan, *The Next Frontier of Law Enforcement: A Proposal for Complete DNA Databanks*, 28 Am. J. Crim. L. 119, 151 (2000). That

---

[19] *Available at* http://www.ussc.gov/Research/Research_ Publications/Recidivism/200405_Recidivism_First_Offender.pdf.

is a huge number of innocent individuals who will never be investigated for, or accused of, a serious crime. And that result itself vindicates an important interest undergirding the Fourth Amendment. As the Second Circuit has observed, by preventing innocent individuals from becoming suspects, DNA collection laws "protect[ ] large numbers of people from having to suffer one of the central indignities with which the Fourth Amendment has historically been concerned—being made a suspect for a crime that one did not commit." *United States* v. *Amerson*, 483 F.3d 73, 88 (2d Cir. 2007); *see also* Akhil R. Amar, *A Search for Justice in Our Genes*, N.Y. Times, May 7, 2002 (discussing benefits to innocent individuals suspected of crimes from more widespread DNA collection).

As Jerry Hobbs' story demonstrates, DNA laws also help free the innocent and prevent wrongful convictions. Nor is his case some isolated incident. The Innocence Project has identified more than 300 people exonerated post-conviction through DNA evidence. *See Facts on Post-Conviction DNA Exonerations*, Innocence Project (2012).[20] And as the courts have recognized, there is an "overwhelming public interest in prosecuting crimes *accurately* and expeditiously." *Kincaid*, 379 F.3d at 839 n.38 (internal quotations and citation omitted).

These beneficial aspects of DNA evidence primarily redound to criminal defendants. But they also serve the interests of crime victims in an important way: The accuracy of DNA evidence provides victims with

---

[20] *Available at* http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php.

assurance that the defendant accused of attacking them or their loved one is the actual perpetrator, and that the real perpetrator is not still at large. In this way, too, collecting DNA from arrestees helps the state treat crime victims and their families with the fairness, respect, and dignity that they deserve.

CONCLUSION

It is easy for individual victims to get lost in a sea of statistics. But each victim has a name, a face, a family and a story unique to her or him. Collecting DNA from arrestees has the potential to give each victim's story the ending it deserves.

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

JULIE A. GROHOVSKY
SHANLON WU
WU, GROHOVSKY & WHIPPLE, P.L.L.C.
1300 Pennsylvania Ave., N.W., Suite 700
Washington, D.C. 20004
(202) 204-3053

RUSSELL P. BUTLER
Executive Director
MARYLAND CRIME VICTIMS' RESOURCE CENTER, INC.
1001 Prince George's Blvd, Suite 750
Upper Marlboro, MD 20774
(240) 335-4030

NEAL KUMAR KATYAL
Counsel of Record
DOMINIC F. PERELLA
LISA SWARTZFAGER*
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5528
neal.katyal@hoganlovells.com

Counsel for Amici Curiae

**Admitted only in Va., supervised by members of D.C. Bar.*

January 2013

AMICUS CURIAE BRIEF

No. 12-207

IN THE

Supreme Court of the United States

STATE OF MARYLAND,

Petitioner,

v.

ALONZO JAY KING, JR.,

Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* SUPPORTING RESPONDENT

JONATHAN HACKER
Co-Chair, Supreme Court Amicus Committee
NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS
1625 Eye Street, NW
Washington, DC 20815
(202) 383-5300

LISA S. BLATT
Counsel of Record
ANTHONY J. FRANZE
SARAH M. HARRIS
ARNOLD & PORTER LLP
555 12th Street, NW
Washington, DC 20004
(202) 942-5000
lisa.blatt@aporter.com

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	5
I. A STATE'S SEARCH FOR DNA SAMPLES FROM AN ARRESTEE'S BODY WITHOUT A WARRANT OR ANY BASIS FOR SUSPECTING THE DNA IS CONNECTED TO A CRIME IS UNREASONABLE, REGARDLESS OF THE BALANCE OF INTERESTS	5
A. Physically Intrusive Searches like the Collection of DNA from Inside an Arrestee's Body Require a Warrant and Probable Cause	5
1. The Fourth Amendment Imposes Especially Strong Protections Against Searches Involving Bodily Intrusions	6
2. No Exigency Excuses the State from Failing to Obtain a Warrant to Collect Arrestee DNA Samples	9
B. The Balance of Interests Alone Does Not Determine Reasonableness Even for Less Intrusive Bodily Searches	10

TABLE OF CONTENTS—Continued

Page

1. Even Less Intrusive Searches Can Dispense with a Warrant and Probable Cause Only by Showing Those Requirements Are Impracticable..... 11

2. Individualized Suspicion Is the Default Required for Less Intrusive Searches..... 13

C. The State's Collection of DNA from Arrestees Falls Outside the Limited Circumstances Permitting Warrantless, Suspicionless Searches . 16

1. Suspicionless Searches Are Reasonable Only If There Is Some Justification Why Individualized Suspicion Would Be Impracticable.. 17

2. DNA Collection from Arrestees Does Not Fall Within the "Special Needs" or Parolee Exceptions..... 20

3. This Court Should Not Create a New Category of Permissible Suspicionless Searches to Fit This Case 28

CONCLUSION 32

TABLE OF AUTHORITIES

CASE	Page
Almeida-Sanchez v. United States, 413 U.S. 266 (1973)	30
Arizona v. Gant, 556 U.S. 332 (2009)	5, 20, 26
Bd. of Educ. v. Earls, 536 U.S. 822 (2002)	12
Bell v. Wolfish, 441 U.S. 520 (1979)	19, 21
Berger v. New York, 388 U.S. 41 (1967)	6
Brown v. Texas, 443 U.S. 47 (1979)	16
Camara v. Mun. Court, 387 U.S. 523 (1967)	*passim*
Carroll v. United States, 267 U.S. 132 (1925)	16
Chandler v. Miller, 520 U.S. 305 (1997)	13, 17
Chapman v. United States, 365 U.S. 610 (1961)	8
Chimel v. California, 395 U.S. 752 (1969)	31
City of Indianapolis v. Edmond, 531 U.S. 32 (2000)	*passim*
City of Ontario v. Quon, 130 S. Ct. 2619 (2011)	12

TABLE OF AUTHORITIES—Continued

Page

Cupp v. Murphy,
412 U.S. 291 (1973) 7, 9

Davis v. Mississippi,
394 U.S. 721 (1969) 9, 15

Dist. of Columbia v. Heller,
554 U.S. 570 (2008) 26, 31

Dunaway v. New York,
442 U.S. 200 (1979) 31

Ferguson v. City of Charleston,
532 U.S. 67 (2001) ..... *passim*

Florence v. Bd. of Chosen Freeholders,
132 S. Ct. 1510 (2012) 19, 21, 26

Griffin v. Wisconsin,
483 U.S. 868 (1987) 29

Henry v. United States,
361 U.S. 98 (1959) 15

Hudson v. Palmer,
468 U.S. 517 (1984) 27

Illinois v. Lidster,
540 U.S. 419 (2004) 17, 18

Illinois v. McArthur,
531 U.S. 326 (2001) 9

Katz v. United States,
389 U.S. 347 (1967) 7

Kentucky v. King,
131 S. Ct. 1849 (2011) 8

TABLE OF AUTHORITIES—Continued

Page

Kyllo v. United States,
533 U.S. 27 (2001) 6, 7

Michigan v. Tyler,
436 U.S. 499 (1978) 21

Mincey v. Arizona,
437 U.S. 385 (1978) 31

Morrissey v. Brewer,
408 U.S. 471 (1972) 29

Nat'l Treasury Employees Union v. Von Raab,
489 U.S. 656 (1989) 12, 13, 18, 21, 22

New Jersey v. T.L.O.,
469 U.S. 325 (1985) 4, 11, 12, 20

O'Connor v. Ortega,
480 U.S. 709 (1987) 12

Payton v. New York,
445 U.S. 573 (1980) 6

Richardson v. Ramirez,
418 U.S. 24 (1974) 26

Samson v. California,
547 U.S. 843 (2006) ..... *passim*

Schmerber v. California,
384 U.S. 757 (1966) 6, 7, 9

Silverman v. United States,
365 U.S. 505 (1961) 7

Skinner v. Ry. Labor Executives' Ass'n,
489 U.S. 602 (1989) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Terry v. Ohio,
392 U.S. 1 (1968)..... 10, 11, 14, 16, 24

Union Pac. R. Co. v. Botsford,
141 U.S. 250 (1891)..... 6

United States v. Brignoni-Ponce,
422 U.S. 873 (1975)..... 10, 16

United States v. Cortez,
449 U.S. 411 (1981)..... 13

United States v. Jones,
132 S. Ct. 945 (2012)..... 6, 7, 8, 22

United States v. Kincade,
379 F.3d 813 (9th Cir. 2004)..... 26, 29

United States v. Knights,
534 U.S. 112 (2001)..... 12

United States v. Martinez-Fuerte,
428 U.S. 543 (1976)..... 19

United States v. Vongxay,
594 F.3d 1111 (9th Cir. 2010)..... 26

Vernonia School District 47J v. Acton,
515 U.S. 644 (1995)..... 12, 14, 16, 18, 21

Wilkes v. Wood,
98 Eng. Rep. 489 (C.B. 1763)..... 15

Winston v. Lee,
470 U.S. 753 (1985)..... 6, 8

Wyoming v. Houghton,
526 U.S. 295 (1999)..... 5

TABLE OF AUTHORITIES—Continued

Page

Ybarra v. Illinois, 444 U.S. 85 (1979) 14

OTHER AUTHORITIES

Chin, Gabriel J. & Holmes Jr., Richard W., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697 (2002) 27

Clancy, Thomas K., *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. Mem. L. Rev. 483 (1995) 15

Cuddihy, William J., *The Fourth Amendment: Origins and Original Meaning* (1990) (Ph.D dissertation, Claremont Graduate School) 15

Davies, Thomas Y., *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547 (1999) 15

STATEMENT OF INTEREST [1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates.

Most significantly for purposes of this case, NACDL has a strong interest in ensuring that the Fourth Amendment remains a robust protection against unreasonable encroachments on individual privacy. NACDL thus has a substantial interest in ensuring that a state's collection of DNA from an arrestee's body is not taken without a warrant, without probable cause to believe that the DNA is related to the crime leading to arrest, and without any suspicion that the DNA sample will produce evidence relevant to any particular crime an arrestee may or may not have committed.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fourth Amendment guards "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Respondent was arrested and charged

---

[1] The parties have given blanket consents to the filing of *amicus* briefs; their written consents are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

with first-degree assault, though he was never convicted of that offense. As an individual charged with a "serious" crime, respondent, like thousands of others, was compelled to have a sample of his DNA taken from his person. The state conducted a Fourth Amendment search when it extracted cells containing DNA from the inside of respondent's mouth. The state used the sample to create a DNA profile; uploaded the profile into CODIS, an electronic system that allows law enforcement personnel to search DNA-based crime scene evidence; discovered that respondent's DNA profile matched evidence left behind in an unsolved crime; and convicted him of that offense.

The state executed this search without a warrant, and with no belief that respondent's DNA had any bearing upon the assault charges for which he was arrested. The state did not suspect respondent of having committed any crime other than assault, let alone believe that his DNA might connect him to the crime with which it was ultimately connected. And the state's avowed purpose in collecting DNA samples from arrestees like respondent is to advance the quintessential law enforcement purpose of solving cold cases.

Petitioner and the United States argue that the Fourth Amendment allows this warrantless, suspicionless search so long as the search advances important governmental interests more than it encroaches upon respondent's privacy interests. Pet. Br. 11-12; U.S. Br. 11-12. Relying principally on *Samson v. California*, 547 U.S. 843 (2006), they propose that because reasonableness is the "touchstone of the Fourth Amendment," the constitutionality of a warrantless, suspicionless search—or any other type

of search—is determined solely by balancing the respective interests in a particular search. Pet. Br. 11; U.S. Br. 11. Here, they say, the government has a strong need to collect arrestees' DNA, respondent's privacy interests are minimal, and that is the end of the inquiry. Pet. Br. 8-10; U.S. Br. 31-32.

This balancing-only approach transforms what is ordinarily the endpoint of Fourth Amendment analysis—determining the reasonableness of a particular search in light of the specific interests presented—into the only inquiry. That approach runs roughshod over the foundational premise of this Court's Fourth Amendment jurisprudence, the presumption that searches—and especially searches that intrude into the body, as this one did—are reasonable only if executed on the basis of a warrant and with probable cause to believe that the search will produce evidence relevant to a crime of which the person being searched is suspected. There was no warrant or probable cause for this search. Departures from the warrant requirement require some strong indication of necessity, like exigent circumstances, but no exigent circumstances justified the collection of respondent's DNA.

Even for searches this Court considers relatively unintrusive, the analysis still begins from the premise that a warrant and probable cause are required. Departure from those requirements mandates some indication that they are demonstrably unworkable—not that it was merely inconvenient or time-consuming for the police to develop sufficient suspicion to obtain a warrant. Yet petitioner and the United States have articulated no reason why a warrant and probable cause would be infeasible preconditions to obtaining an arrestee's DNA. Even

so, the default presumption remains that the state cannot subject an individual to a search unless the individual's actions have given rise to some suspicion of wrongdoing.

Petitioner and the United States nonetheless attempt to shoehorn this search into the exceptionally limited categories of warrantless, suspicionless searches this Court has approved, *i.e.*, searches that raise "special needs, beyond the normal need for law enforcement, [that] make the warrant and probable-cause requirement impracticable," *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment), and searches of parolees related to conditions of parole. But those searches, too, are types in which a warrant and probable cause are unworkable. And they depart from the core requirement of individualized suspicion only because that requirement is demonstrably incompatible with the government's objectives in conducting a particular search—for instance, because an imminent public danger requires immediate preventive investigation.

Here, however, the only reason for dispensing with individualized suspicion as a prerequisite to obtaining an arrestee's DNA appears to be convenience; it is easier for the state to search all arrestees than to devote investigative resources to pinpointing undetected recidivists or to await a conviction before taking DNA. Collecting arrestees' DNA thus presents no "special need beyond the normal need for law enforcement," *id.*, because the overriding purpose of doing so is to crack cold cases. Arrestees are also fundamentally different from parolees, whose rights are categorically lessened by the fact of conviction and who consent to suspicionless searches as a condition of their release from prison. To deem the search

here reasonable would open the floodgates to the very type of searches the Framers considered most oppressive.

ARGUMENT

I. A STATE'S SEARCH FOR DNA SAMPLES FROM AN ARRESTEE'S BODY WITHOUT A WARRANT OR ANY BASIS FOR SUSPECTING THE DNA IS CONNECTED TO A CRIME IS UNREASONABLE, REGARDLESS OF THE BALANCE OF INTERESTS

A. Physically Intrusive Searches like the Collection of DNA from Inside an Arrestee's Body Require a Warrant and Probable Cause

Rather than simply balancing the relative interests involved in a given search, this Court's Fourth Amendment "analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). The warrant and probable cause requirements apply with greatest force to the types of searches considered unlawful at the time the Fourth Amendment was framed. *Cf. Wyoming v. Houghton*, 526 U.S. 295, 299 (1999).

Extracting a DNA sample from the inside of an arrestee's body, no less than an intrusion into the home, falls within the core category of searches

historically considered unlawful absent a warrant and probable cause. And the search here does not involve exigency or any other limited exception to the warrant requirement.

1. The Fourth Amendment Imposes Especially Strong Protections Against Searches Involving Bodily Intrusions

"[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates." *United States v. Jones*, 132 S. Ct. 945, 950 (2012). And because the "overriding respect for the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic," *Payton v. New York*, 445 U.S. 573, 601 (1980), "[w]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo v. United States*, 533 U.S. 27, 31 (2001).

That rule extends with equal, if not greater, force to searches violating the sanctity of one's body. "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person." *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). This Court long has considered the security of one's person against intrusive searches "at the core of the Fourth Amendment." *Berger v. New York*, 388 U.S. 41, 53 (1967); *see also City of Indianapolis v. Edmond*, 531 U.S. 32, 54 (2000) (Rehnquist, J., dissenting). Because "warrants are ordinarily required for searches of dwellings . . . no less could be required where intrusions into the human body are concerned." *Schmerber v. California*, 384 U.S. 757,

770 (1966); *see also Winston v. Lee*, 470 U.S. 753, 760-61 (1985).[2]

Petitioner would throw out these longstanding Fourth Amendment principles on the basis that searches like the one here are "de minimis invasion[s] of personal integrity." Pet. Br. 13. But when it comes to invasions of the body, the question is not the *degree* of physical invasion. The dispositive question—for searches involving the home and body alike—is the *existence* of any intrusion into a constitutionally protected area at all. *See Silverman v. United States*, 365 U.S. 505, 512 (1961). After all, a warrant and probable cause are mandatory for "any physical invasion of the structure of the home, 'by even a fraction of an inch.'" *Kyllo*, 533 U.S. at 37 (citation omitted). There is no principled reason for a different rule for a search of a person's body. Indeed, "intrusions beyond the body's surface" ordinarily are considered unreasonable absent a warrant and probable cause. *Schmerber*, 384 U.S. at 769. Even painlessly drawing blood, *see id.* at 771, or scraping detritus from beneath a suspect's fingernails are "severe, though brief, intrusion[s] upon cherished personal security." *Cupp v. Murphy*, 412 U.S. 291, 295 (1973)

---

[2] Even physically unintrusive searches of the person may implicate substantial Fourth Amendment concerns if they encroach upon expectations of privacy society recognizes as reasonable. *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). But the "*Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." *Jones*, 132 S. Ct. at 952. In other words, "core" Fourth Amendment searches include, but are not limited to, searches that implicate common-law notions of trespass—and face the heavy presumption that a warrant and probable cause are required.

(citation and quotation marks omitted). Far from "barely register[ing]" under the Fourth Amendment, U.S. Br. 18, extracting a sample of respondent's DNA from the inside of his mouth is a search entitled to the Fourth Amendment's strongest protections.[3]

The United States fares even worse with its theory that collecting a buccal sample of respondent's DNA is less of a search because the collection is from inside of one's cheek, which is "visible to others when an individual speaks, yawns, or eats, and accustomed to touching with a toothbrush." U.S. Br. 17. As this Court's jurisprudence concerning the searches of structures established, physical intrusion is no less of an encroachment because the intrusion involves an area occasionally exposed to public view. *See Jones*, 132 S. Ct. at 950, 952. Police cannot enter a home without a warrant merely because incriminating items inside the house are visible from outside. *See Kentucky v. King*, 131 S. Ct. 1849, 1858 (2011); *Chapman v. United States*, 365 U.S. 610, 613-14 (1961). What is more, a brief glimpse of someone's inner cheek at best exposes dentistry, not the potentially incriminating information derived from microscopic DNA. And DNA is a far cry from fingerprints or other "'physical characteristics constantly exposed to the public'" that receive no Fourth Amendment

---

[3] This Court in *Skinner*, 489 U.S. 602, permitted a blood draw and other testing on less than a warrant and probable cause, but in far different circumstances. There, the search was of railroad employees engaged in safety-sensitive tasks who effectively consented to these intrusions by participating in a pervasively regulated industry and were on notice of the "circumstances justifying toxicological testing and the permissible limits of such intrusions." *Id.* at 622, 627; *see also Ferguson v. City of Charleston*, 532 U.S. 67, 90-91 (2001) (Kennedy, J., concurring in judgment).

protection. *Cupp*, 412 U.S. at 295 (quoting *United States v. Dionisio*, 410 U.S. 1, 14 (1973)); *see also Davis v. Mississippi*, 394 U.S. 721, 727 (1969).

2. No Exigency Excuses the State from Failing to Obtain a Warrant to Collect Arrestee DNA Samples

Nor does collecting DNA from a person's body fall within any relevant exception to the warrant requirement. If a search involves "exigent circumstances," this Court has been willing on occasion to dispense with the warrant requirement and engage in balancing the interests "rather than employing a *per se* rule of unreasonableness." *Illinois v. McArthur*, 531 U.S. 326, 331 (2001). Those circumstances are absent here.

This Court has found that drawing blood from a driver suspected of driving under the influence, for example, is permissible without a warrant only when the time spent obtaining a warrant, transporting the suspect to the hospital, and investigating the accident scene would have allowed evidence of blood-alcohol content to dissipate. *Schmerber*, 384 U.S. at 770-71. This Court likewise has held that police officers could scrape beneath a suspect's fingerprints for visible blood residue without a warrant where the suspect was attempting to destroy this incriminating and "highly evanescent evidence." *Cupp*, 412 U.S. at 296. Even then, such searches are ordinarily reasonable only if they are predicated upon probable cause. Any lesser standard is categorically foreclosed, since "[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained." *Schmerber*, 384 U.S. at 769-70; *see also Winston*, 470 U.S. at 760-61.

Unlike those cases, the collection of respondent's DNA involves no exigency. Indeed, DNA is useful to law enforcement precisely because it cannot be hidden, destroyed, or altered. Far from needing to take a spur-of-the-moment DNA sample lest the opportunity be lost, the state has ample opportunity to take DNA samples from arrestees like respondent who are often in pretrial detention for months between arraignment and trial. And even if exigency were involved, there was no probable cause—or even any reason at all—to believe that respondent's DNA might have any connection to a crime, let alone a past, unsolved crime.

B. The Balance of Interests Alone Does Not Determine Reasonableness Even for Less Intrusive Bodily Searches

Some less-than-"full-blown" searches—most obviously, a "stop and frisk" by a police officer who observes suspicious behavior while on patrol—may be reasonable even without a warrant or probable cause. *Terry v. Ohio*, 392 U.S. 1, 19-21 (1968); *see also United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975).

The state's extraction of DNA from inside a person's mouth is hardly the equivalent of a pat-down in the field. But even if DNA collection were considered a minimal intrusion, it would not be reasonable merely if the state's interests in obtaining the DNA outweighed respondent's privacy interests, as petitioner and the United States contend. Departures from the norms of a warrant and probable cause have never been justified merely because the balance of interests favors the government. At minimum, some obvious indication that a warrant and probable cause would be impracticable has always been necessary. Even then, the requirement that the police have some

degree of individualized suspicion remains a strong default rule, and cannot be bypassed merely because the balance of interests purportedly favors the government.

1. Even Less Intrusive Searches Can Dispense with a Warrant and Probable Cause Only by Showing Those Requirements Are Impracticable

Because "the Fourth Amendment governs all intrusions by agents of the public upon personal security," less than "full-blown search[es]" are nonetheless subject to the Fourth Amendment's baseline presumptions of a warrant and probable cause. *Terry*, 392 U.S. at 17 n.15, 19, 20; *see also New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). Thus, "[i]n assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but . . . whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Camara v. Mun. Court*, 387 U.S. 523, 533 (1967).

Accordingly, while the circumstances of these less-than-full searches vary, one constant runs through them: the nature of each search is incompatible with the full requirements of a warrant and probable cause. A warrant and probable cause are impracticable when police conduct a brief "stop and frisk" because such procedures involve "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat." *Terry*, 392 U.S. at 20. A warrant and probable cause would thwart the element of surprise essential to effective searches of probationers' houses, because "probationers have

even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal." *United States v. Knights*, 534 U.S. 112, 120 (2001). All "special needs" cases by definition involve "special needs, beyond the normal need for law enforcement, [that] make the warrant and probable-cause requirement impracticable." *City of Ontario v. Quon*, 130 S. Ct. 2619, 2628 (2011) (citation and quotation marks omitted).[4] In all of these cases, in sum, this Court has required something more than the ever-present challenge law enforcement personnel face in identifying and investigating suspects who might have committed crimes.

This case involves no valid justification for dispensing with a warrant and probable cause, and is thus unreasonable regardless of the balance of interests involved. *See Camara*, 387 U.S. at 533. Unlike petitioner, the United States at least acknowledges that the impracticability of a warrant and probable cause is a "feature[]" beyond the "relative strength of . . . interests" that often defines the reasonableness of a search. U.S. Br. 32. But the United States' extra-

---

[4] Thus, for example, in the school context, a warrant and probable cause would "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." *T.L.O.*, 469 at 340, 341; *see also Bd. of Educ. v. Earls*, 536 U.S. 822, 828-29 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995). For drug testing in certain occupations, a warrant and probable cause would frustrate the need to discover "latent or hidden" usage of contraband and "prevent their development." *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 667-68 (1989); *see also Skinner*, 489 U.S. at 622-24, 631. And for government employees, they would "seriously disrupt the routine conduct of business." *O'Connor v. Ortega*, 480 U.S. 709, 722 (1987) (plurality).

ordinary contention that obtaining a warrant to collect respondent's DNA would have been impracticable because it would "jeopardize the benefits" of DNA collection, U.S. Br. 32-33, confuses convenience with necessity. The only conceivable obstacle a warrant presents here is the requirement of probable cause—the very difficulty that the Framers intended to impose.

2. Individualized Suspicion Is the Default Required for Less Intrusive Searches

Balancing alone could not render the collection of respondent's DNA a reasonable search even if a warrant and probable cause were impracticable. That is because balancing the interests in these cases begins from the "main rule" that the Fourth Amendment "generally bars officials from undertaking a search or seizure absent individualized suspicion." *Chandler v. Miller*, 520 U.S. 305, 308, 313 (1997). In other words, the strong presumption is that there must be "a suspicion that the particular individual being stopped is engaged in wrongdoing," and, in the context of a search, that the search of a particular person will yield evidence of wrongdoing. *United States v. Cortez*, 449 U.S. 411, 418 (1981).

Petitioner and the United States rightly decline to argue that there was any individualized suspicion here: the state concededly had no reason to suspect respondent of any offense other than the one for which he was arrested, let alone believe that his DNA would connect him to any crime. They instead reason that because individualized suspicion is not an "indispensable component of reasonableness in every circumstance," *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989), it is no

requirement at all. Under their position, individualized suspicion is the Fourth Amendment equivalent of extra credit: encouraged but unnecessary if the government's interests already tipped the scales. Pet. Br. 12; U.S. Br. 11-12. All that the Fourth Amendment means by reasonableness, they suggest, is that the government's interest in the search prevails. *See id.*

That position discards "the central teaching of this Court's Fourth Amendment jurisprudence," the "demand for specificity in the information upon which police action is predicated." *Terry*, 392 U.S. at 21 n.18; *see also Vernonia School District 47J v. Acton*, 515 U.S. 644, 678 (1995) (O'Connor, J., dissenting). Though individualized suspicion is not required *per se*, it does not follow that individualized suspicion has *no* relevance to whether a search is reasonable, nor that the balance of interests alone is the only determinant of whether any warrantless search is reasonable. Were that so, the warrantless, suspicionless search in *Ferguson*, in which the state had a compelling need to prevent cocaine abuse during pregnancy by testing expectant mothers, would have easily been upheld. *Ferguson v. City of Charleston*, 532 U.S. 67, 70-72, 81 (2001). So, too, would the state's paramount interest in stopping and searching all cars at a roadblock for illegal drugs have justified the search and seizure in *Edmond*. 531 U.S. at 40-41.

By downgrading individualized suspicion from a presumptive constraint on official action to an afterthought, the approach petitioner and the United States advance would also vitiate the concerns that spurred the Fourth Amendment's creation. "Nothing is more clear," this Court has said, "than that the Fourth Amendment was meant to prevent wholesale

intrusions upon the personal security of our citizenry." *Davis*, 394 U.S. at 726. Among the most oppressive measures the British crown employed against American colonists were "promiscuous" and "dragnet searches" of houses. William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning, 602-1791*, at 518-21, 696-99 (1990) (Ph.D dissertation, Claremont Graduate School). The founding generation objected strenuously to subjecting the doors of the "impenetrable Castles of freemen" to "perpetual invasion" through the indiscriminate use of blanket searches, with or without warrants. *Id.* at 1375-82; 1402; 1499-1501. Indeed, they opposed general warrants precisely because "no offenders names are specified in the warrant." *Wilkes v. Wood*, 98 Eng. Rep. 489, 498 (C.B. 1763); *see also* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 576-89 (1999). With the revolution won and the republic in its infancy, the Framers viewed the requirement that the government have some basis for singling out an individual before instigating an intrusion as perhaps the greatest protection against the abuses they had suffered. *See* Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. Mem. L. Rev. 483, 526-30 (1995); *Henry v. United States*, 361 U.S. 98, 100-01 (1959). That understanding not only underpinned the Fourth Amendment's requirements of particularity and probable cause to obtain a warrant, but the entire notion of what constituted a "reasonable" search. Clancy, at 526-30.

Individualized suspicion remains a bulwark against arbitrary intrusion under this Court's precedents. Requiring some modicum of suspicion as a precondition of police action guards against "intru-

sions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches." *Terry*, 392 U.S. at 22. It is the last, best safeguard against "arbitrary invasions solely at the unfettered discretion of officers in the field," and provides an objective metric against which an officer's actions can be judged. *Brown v. Texas*, 443 U.S. 47, 51 (1979). Individualized suspicion limits the scope of the government's potential intrusions; the state's potentially immense investigatory powers single out an individual only when the state has reason to suspect that a particular person has committed a particular crime. *Ybarra v. Illinois*, 444 U.S. 85, 90-91 (1979). The requirement of individualized suspicion likewise cedes some control to individuals to dictate their relationship to the state: by avoiding wrongful behavior, they may minimize the possibility of the intrusion in the first place. *See Vernonia*, 515 U.S. at 667 (O'Connor, J., dissenting). A blanket warrantless, suspicionless search instead indiscriminately intrudes upon the many who have done nothing to bring themselves within the ambit of the state. *See, e.g.*, *Brignoni-Ponce*, 422 U.S. at 882; *Carroll v. United States*, 267 U.S. 132, 153-54 (1925). It is little surprise, then, that this Court has considered searches that depart from the individualized-suspicion standard reasonable only if there are strong justifications—absent here—for departing from this standard.

C. The State's Collection of DNA from Arrestees Falls Outside the Limited Circumstances Permitting Warrantless, Suspicionless Searches

Warrantless, suspicionless searches are "forbid[den] . . . in the absence of special circumstances." *Illinois*

v. Lidster, 540 U.S. 419, 423 (2004). These special circumstances must be "particularized," *Chandler*, 520 U.S. at 313, and are "limited," *Edmond*, 531 U.S. at 37. They are present only if it is necessary—not just preferable or convenient—for the government to subject every member of an identified group to a search. Even then, this Court has recognized only two types of permissible suspicionless searches: searches that present a "special need" and searches of parolees. The collection of DNA from arrestees fits neither category. Nor can it be justified as a new exception.

1. Suspicionless Searches Are Reasonable Only If There Is Some Justification Why Individualized Suspicion Would Be Impracticable

There is no basis for resorting to balancing to gauge the reasonableness of collecting respondent's DNA, or even considering whether this case falls into one of the two narrow exceptions allowing suspicionless searches. That is because the search here lacks a key criterion always required of suspicionless searches: justification for why individualized suspicion would be impracticable. Only if "an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion," might "a search . . . be reasonable despite the absence of such suspicion." *Skinner*, 489 U.S. at 624. This criterion is not just a "feature[]" common among cases upholding suspicionless searches, U.S. Br. 32, but the heart of the reasonableness inquiry.

This Court has upheld warrantless, suspicionless searches only after confirming that individualized suspicion would be incompatible with the objectives of the search. For example, requiring individualized suspicion would be impracticable for most administrative searches because "the Government seeks to *prevent* the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person." *Von Raab*, 489 U.S. at 668; *see also Camara*, 387 U.S. at 537. The need to avert a potentially imminent public danger demands immediate action; by the time suspicion crystallizes, the harm may have already come to pass.

Similarly, random, suspicionless drug tests of high school athletes in a school plagued by a drug epidemic were essential because "[d]rug testing on suspicion of drug use" would pose "substantial difficulties—if it is indeed practicable at all" given that drug-impaired individuals seldom display signs detectable by lay persons. *Vernonia*, 515 U.S. at 663-64. And individualized suspicion was impracticable when police urgently sought witnesses to a recent hit-and-run accident by setting up a roadblock near the accident site. "Like . . . crowd control or public safety, an information-seeking stop is not the kind of event that involves suspicion, or lack of suspicion, of the relevant individual." *Lidster*, 540 U.S. at 424-25. Police had no recourse but to stop all cars because no discernible behavior—beyond perhaps the possibility that witnesses might travel the same road again—

would ever distinguish witnesses from ordinary citizens. *Id.* at 423.[5]

The state's asserted need to collect DNA samples from all arrestees fundamentally differs from those searches. The state seeks to search all arrestees because it does not know which arrestees may have left behind DNA at crime scenes in cold cases. Pet. Br. 23. In this case, individualized suspicion has no role to play only in the sense that the state wishes to save time and money by searching all arrestees as a class, rather than expending investigative resources to support each search with individualized suspicion. *Id.*; U.S. Br. 32. Requiring individualized suspicion is hardly incompatible with solving crimes; it is instead the constitutional norm.

---

[5] *See also United States v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976) (individualized suspicion impracticable "because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens"); *Skinner*, 489 U.S. at 628, 631 ("Obtaining evidence that might give rise to the suspicion that a particular employee is impaired, a difficult endeavor in the best of circumstances, is most impracticable in the aftermath of a serious accident."); *Camara*, 387 U.S. at 535 (requiring individualized suspicion would undermine "the only effective way to seek universal compliance" with municipal safety codes); *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1520-22 (2012) (requiring officers to decide which detainees to strip search for contraband based on seriousness of offense as predictor would be unworkable); *Bell v. Wolfish*, 441 U.S. 520, 559-60 & n.40 (1979) (individualized suspicion impracticable because in order for suspicion to crystallize, officers would have to closely observe prisoners during contact visits at the price of "the confidentiality and intimacy that these visits are intended to afford").

2. DNA Collection from Arrestees Does Not Fall Within the "Special Needs" or Parolee Exceptions

Only if a suspicionless search falls into one of two narrowly defined categories has this Court ever determined that the balance of interests renders the search reasonable. Those two categories are searches in which "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable," *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in judgment), and searches involving parolees who have consented to random searching as a condition of parole, *Samson*, 547 U.S. at 847. Some members of this Court have suggested that even these exceptions may be over-broad in light of the "doubt" that "the Framers . . . would have considered 'reasonable' a program of indiscriminate stops of individuals not suspected of wrongdoing." *Edmond*, 531 U.S. at 56 (Thomas, J., dissenting). In any event, neither the "special needs" exception nor the parolee exception encompasses the collection of DNA samples from arrestees.

a. Traditionally, searches that raised "special needs" were the only category of suspicionless searches this Court recognized as constitutionally permissible.[6] *Cf.*

---

[6] Searches incident to lawful arrest are not suspicionless *per se*, because probable cause for the underlying arrest singles out the individual being arrested. And the authority to search incident to arrest does not extend to evidence of other crimes for which officials have no individualized suspicion. *Arizona v. Gant*, 556 U.S. 332, 339, 343-44 (2009). In any event, neither petitioner nor the United States seriously contends that the search here could be justified based on search-incident-to-arrest doctrine. And as respondent argues, the doctrine is inapplicable to the facts in this case. Resp. Br. 33-34.

Samson, 547 U.S. at 855 n.4. And like virtually every other Fourth Amendment doctrine, "special needs" cases do not balance interests first and consider other constraints on reasonableness later. To the contrary, the "special needs" doctrine insulates otherwise unlawful suspicionless searches only if, after a rigorous inquiry into the search's underlying purpose, the Court is satisfied that the asserted "special need" is for "prophylactic and distinctly *non*punitive purposes." *Vernonia*, 515 U.S. at 658 n.12; *see also Ferguson*, 532 U.S. at 79-80; *Edmond*, 531 U.S. at 41-42. If the "primary purpose" of the search is instead to ease the way for a criminal investigation, the search is impermissible irrespective of the government's asserted purpose, and regardless of how the respective interests might have balanced. *Edmond*, 531 U.S. at 42-43.

Given this threshold constraint, the kinds of searches permitted under this doctrine fall into predictable patterns, namely random drug tests of groups whose use of illegal drugs would create particular safety hazards or other risks, *e.g.*, *Von Raab*, 489 U.S. at 666; *Vernonia*, 515 U.S. at 661-62; *Skinner*, 489 U.S. at 620-21, random searches of prisoners whose access to contraband and makeshift weapons must be vigorously monitored to protect the safe administration of the prison system, *e.g.*, *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1517 (2012); *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), and random administrative searches of buildings or businesses for safety violations, *e.g.*, *Michigan v. Tyler*, 436 U.S. 499, 507-09, 511-12 (1978); *Camara*, 387 U.S. at 534-39.

In every instance when this Court has considered such searches reasonable, it has placed great weight

on the fact that any evidence discovered was either kept private and never disclosed to the police as a matter of policy, *e.g. Von Raab*, 489 U.S. at 666; *Skinner*, 489 U.S. at 621 n.5, or was part of a safety inspection regime executed outside the law enforcement process, *e.g.*, *Camara*, 387 U.S. at 535.

Tellingly, petitioner does not argue that the state's collection of respondent's DNA presents a similar "special need." Indeed, petitioner mentioned the "special needs" doctrine so fleetingly below, *see King v. Maryland*, 42 A.3d 549, 557 (Md. 2012), that the argument should be considered forfeited. *Jones*, 132 S. Ct. at 954. And the United States half-heartedly argues in a footnote that the collection of respondent's DNA served a number of non-law enforcement purposes, in addition to the goal of solving cold cases. U.S. Br. 32 n.12.

The United States' belated portrayal of the collection of respondent's DNA as a search driven by anything other than solving crimes is futile. This Court has never taken the government's invocation of a "special need" at face value. *Ferguson*, 532 U.S. at 81; *Edmond*, 531 U.S. at 41-42. And for all the reasons respondent has catalogued, there can be no question that Maryland mandated the collection of arrestees' DNA primarily because it sought to solve more cold cases. Resp. Br. 28-29.

Nor is there any dispute that the collection of DNA samples from arrestees like respondent is performed by law enforcement officers and intimately tied to the criminal justice system at every stage. Respondent's DNA was entered into CODIS—a system accessible to, and used by, law enforcement officials and criminal justice agencies. And when respondent's DNA produced a match to a cold case, the match served as

probable cause for a warrant to obtain another sample, which in turn led directly to petitioner's indictment for the unsolved sexual assault.

b. Because this case plainly does not implicate a "special need," petitioner and the United States hang their justification for this search on the proposition that the parolee exception articulated in *Samson v. California*, 547 U.S. 843 (2006), extends to arrestees. *See* Pet. Br. 12-13; U.S. Br. 13-14. In *Samson*, this Court approved a police officer's warrantless, suspicionless stop and search of a parolee, who was found carrying methamphetamine; his parole was revoked, and he was prosecuted for drug possession. 547 U.S. at 846-47. *Samson* deemed that search permissible after reiterating that balancing the interests is the "general Fourth Amendment approach" used to determine reasonableness, *id.* at 848—a statement the petitioner and the United States read broadly to cast aside decades of this Court's jurisprudence and endorse their balancing-only approach. Pet. Br. 12-13; U.S. Br. 13.

Samson approved the suspicionless search there by stressing the "severely diminished expectations of privacy by virtue of [parolees'] status alone." 547 U.S. at 852. To petitioner and the United States, *Samson* thus extends to the search here: arrestees, they say, have nearly as reduced privacy expectations as parolees because arrest prompts extensive governmental intrusions and supervision. Arrestees thus have virtually no expectation of privacy in their DNA, or in anything else, they conclude, and the state's interests in using that DNA appear vast in comparison. Pet. Br. 8-10, 16-18; U.S. Br. 14-16, 31-32.

Samson, however, did not elevate the balance of interests above all other indicia of reasonableness,

and its holding should not be extended beyond parolees. To the contrary, *Samson* involved long-standing bases for departing from the warrant and individualized-suspicion requirements. The search in *Samson* involved a brief, chance encounter in which a police officer stopped and searched Samson during a routine patrol. 547 U.S. at 846. That, of course, is precisely the type of search for which the warrant and probable cause requirements have long been relaxed even as to ordinary citizens. *See, e.g.*, *Terry*, 392 U.S. at 20.

Samson's status as a parolee also implicated more than just his privacy interests. As the Court emphasized, parolees' rapid and deft ability and heightened incentive to conceal or destroy evidence of criminality make an individualized-suspicion requirement incompatible with the supervisory needs of the parole system. 547 U.S. at 854-55. And the state's purpose in closely supervising parolees goes well beyond ordinary crime prevention, and extends to reintegrating parolees into civil society at a vulnerable moment. *Id.* at 853. In sum, *Samson*'s reasoning relied on the same criteria this Court has always looked to before resorting to balancing—namely, the impracticability of a warrant and individualized suspicion. Irrespective of whether *Samson* considered these criteria within a more expansive "balancing" inquiry or instead as threshold considerations, they remain independent and indispensable elements of reasonableness—and, as noted above, they are entirely absent from the search here.

Nor is it plausible to read *Samson* as a sea change in this Court's Fourth Amendment jurisprudence in which this Court endorsed *sub silentio* the reasonableness of any type of suspicionless search so long as

the balance of interests favors the government. The narrowness of *Samson*'s holding is evident from the question presented: "whether a suspicionless search, conducted under the authority" of a statute providing that "every prisoner eligible for release on state parole 'shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time . . . with or without a search warrant and with or without cause,'" is consistent with the Fourth Amendment. 547 U.S. at 846.

The proper reading of *Samson* is that parole presents unique circumstances that make suspicionless searches of parolees reasonable regardless of whether the search also presents "special needs." The two fundamental characteristics of parole, *Samson* stated, are that it is "an established variation on imprisonment of convicted criminals," *id.* at 850 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972)), and that it is a "release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence," *id.* Taken together, the Court held that these two characteristics deprived Samson of *any* legitimate expectation of privacy—and accordingly any grounds for objecting to a suspicionless search of his outer pockets. *Id.* at 852.

Samson thus cannot be extended to authorize suspicionless searches of arrestees in the first instance; to do so would ignore the dispositive role conviction plays in circumscribing constitutional rights. Prior to conviction, arrestees' expectations of privacy can indeed be encroached upon in numerous ways—for instance through searches incident to arrest and the exhaustive visual searches of one's body and cell that occur during pretrial detention.

See Pet. Br. 17; U.S. Br. 15-16. The extent of those intrusions, however, is always carefully tailored to the needs justifying those searches. The authority to search incident to arrest extends only far enough to protect officer safety and preserve evidence of the offense of arrest; only an arrestee's person and immediate surroundings can be searched. *Gant*, 556 U.S. at 339. And the extent of a search that a pretrial detainee can be subjected to while in custody extends only as far as the specific needs of prison administration demand—*e.g.*, to protecting guards and other prisoners against the hazards of contraband and smuggled weapons. *Florence*, 132 S. Ct. 1510. It does not follow that because arrestees' expectations of privacy are diminished in these carefully defined ways, their entire "store of privacy," including in their DNA, is virtually empty, and that any intrusion is presumably permissible. Pet. Br. 16-17; U.S. Br. 16.

Conviction is "transformative." *United States v. Kincade*, 379 F.3d 813, 834 (9th Cir. 2004). This Court has indicated that conviction not only subjects convicts to a "continuum of state-imposed punishments," *Samson*, 547 U.S. at 850 (citation and quotation marks omitted); it also categorically reduces convicts' expectation of privacy—and entitlement to a number of other rights—as a consequence of their breach of the social contract. Convicts may be prohibited from exercising Second Amendment rights, irrespective of whether the crime for which they were convicted involved a handgun or was even violent. *Dist. of Columbia v. Heller*, 554 U.S. 570, 626 (2008); *see also United States v. Vongxay*, 594 F.3d 1111, 1113-18 (9th Cir. 2010). Convicts may be deprived of the right to vote. *Richardson v. Ramirez*, 418 U.S. 24, 54-56 (1974). They may be subject to

licensing and employment restrictions, and may lose access to benefits such as health care, food stamps, housing assistance, and educational loans. Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 705-06 (2002). So, too, has this Court held that their Fourth Amendment rights are diminished even beyond what the administration of the prison system demands, because "under our system of justice, deterrence and retribution are factors in addition to correction." *Hudson v. Palmer*, 468 U.S. 517, 524 (1984). When convicts—including parolees and probationers—are subject to any search, this Court has described their expectations of privacy as diminished *per se* because their unlawful conduct has deprived them of a full entitlement to the Fourth Amendment's protections. That is why collecting convicts' DNA, as opposed to obtaining samples from arrestees like respondent, may not violate the Fourth Amendment.

Parolees differ from arrestees in one other way that *Samson* considered critical: parolees, unlike arrestees, chose their status, and were at least aware of the Fourth Amendment protections they might be losing as a result of their choice. The "essence of parole" is that the remainder of a parolee's sentence is served outside prison, "on the condition that the prisoner abide by certain rules during the balance of the sentence." *Samson*, 547 U.S. at 850 (quoting *Morrissey*, 408 U.S. at 477). A parolee may avoid the restrictions of prison—strip-searches, total constraints upon one's movement, and constant surveillance—by agreeing to rules as far-reaching as abstaining from alcohol, never traveling more than fifty miles without permission, and, critically, being subject to suspicionless searches at any

time. *Id.* at 851-52. Not only are these conditions generally permissible elements of parole; Samson "signed an order" accepting that he could be searched for no reason at any time, and was thus "'unambiguously' aware" of the condition. *Id.* at 852 (citation omitted). He thereby diminished his already-low expectation of privacy to a point where he "did not have an expectation of privacy that society would recognize as legitimate." *Id.* Arrestees, by contrast, have no such control over when they will be arrested, nor any opportunity to choose among the relative constraints they may face. Respondent certainly faced no choice as to whether to abandon any expectation of privacy in his DNA—and *Samson* accordingly cannot be extended to justify this search.

3. This Court Should Not Create a New Category of Permissible Suspicionless Searches to Fit This Case

To date, the bright-line principle that has kept mass suspicionless searches to a minimum has been that such searches cannot be undertaken for a law enforcement purpose. This Court has long expressed "particular[] reluctan[ce] to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends." *Edmond*, 531 U.S. at 43; *see also Ferguson*, 532 U.S at 88 (Kennedy, J., concurring in judgment). That reluctance is well-founded, because warrantless, suspicionless searches offer fewer opportunities for abuse, and have less grave consequences, only when the fruits of such searches are not used to deprive anyone of their liberty through prosecution. Non-law enforcement searches accordingly represent a "less hostile intrusion" than the "great bulk of Fourth Amendment

cases," which involve "the typical policeman's search for the fruits and instrumentalities of crime." *Camara*, 387 U.S. at 530. *Samson* did not weaken the validity of this rule. Even aside from Samson's acknowledgement that he would be subject at any time to suspicionless searches, this Court has long recognized that the administration of the parole system—including the detection and prevention of recidivism during a particularly fragile period—serves purposes distinguishable from ordinary law enforcement functions. *See Samson*, 547 U.S. at 853; *Morrissey*, 408 U.S. at 478; *cf. Griffin v. Wisconsin*, 483 U.S. 868, 873-75 (1987).

Petitioner and the United States would substitute that rule with a balancing-only inquiry that places no limit on the scope or type of suspicionless searches that might be considered reasonable. There is certainly no obvious limit to the logic of petitioner's and the United States' argument that "the results of the balancing test may permit the government to dispense" with the "conditions" of a warrant and individualized suspicion when "the governmental need is especially great." U.S. Br. 8, 12. Many intrusions could be characterized as "de minimis," at least in comparison to a far-reaching social evil the government hopes to solve.

Indeed, arrestees stand in no different position from law-abiding individuals in society who pass through an airport, or travel in a car. Until the moment of conviction, arrest is a "transient status." *Kincade*, 379 F.3d at 836. Many arrestees are never charged, others have charges dismissed when a magistrate determines that there was insufficient cause for the arrest, others have charges dismissed for insufficiency at later phases, and still others are

exonerated. Beyond the limited intrusions on privacy during their period of arrest, which are permitted to ensure the safety of those who have taken them into custody, arrestees' expectation of privacy is not diminished whatsoever. The only difference is that arrestees have come into incidental contact with law enforcement. And it is no exaggeration to say that literally hundreds of thousands are arrested annually in this country. In other words, if the Fourth Amendment does not preclude law enforcement from subjecting arrestees to generalized, exploratory searches merely because of their temporary status as arrestees, then it would not prohibit law enforcement from taking swabs from every person.

In light of these concerns, this Court has long held that "'the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose.'" *Ferguson*, 532 U.S. at 86 (quoting *Edmond*, 531 U.S. at 42-43). Approving the search in this case would thus mark a dramatic departure from this Court's prior cases, and a dangerous one as well. If the balance of interests alone dictated when a suspicionless search is reasonable, mass searches could well become "a routine part of American life." *Edmond*, 531 U.S. at 42. There would no longer be any absolute bar on "random area searches which are no more than 'fishing expeditions' for evidence to support prosecutions." *Almeida-Sanchez v. United States*, 413 U.S. 266, 278 (1973) (Powell, J., concurring). There would no longer be any principle limiting the types of permissible suspicionless searches. This Court has consistently rejected proposed exceptions to the warrant and individualized-suspicion requirements that would swallow the rule. *See, e.g.*, *Dunaway v. New York*, 442 U.S. 200, 213 (1979);

Mincey v. Arizona, 437 U.S. 385, 393 (1978); *Chimel v. California*, 395 U.S. 752, 765 (1969). It should do so here as well.

* * * * *

Petitioner and the United States have advanced a view of the Fourth Amendment that would deprive searches of all safeguards save the malleable requirement that the government's interests prove superior to the individual's. This Court has always rejected that view, and should do so again. "[T]he protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases," this Court has explained. *Dunaway*, 442 U.S. at 213. As this Court recently reiterated, the "core protection" of any "enumerated constitutional right" cannot be wholly contingent upon "a freestanding 'interest-balancing' approach." *Heller*, 554 U.S. at 634. That is because "the very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Id.* Petitioner and the United States' radical departure from that principle should be rejected.

CONCLUSION

The judgment of the Maryland Court of Appeals should be affirmed.

Respectfully submitted,

JONATHAN HACKER
Co-Chair, Supreme Court Amicus Committee
NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS
1625 Eye Street, NW
Washington, DC 20815
(202) 383-5300

LISA S. BLATT
Counsel of Record
ANTHONY J. FRANZE
SARAH M. HARRIS
ARNOLD & PORTER LLP
555 12th Street, NW
Washington, DC 20004
(202) 942-5000
lisa.blatt@aporter.com

Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-207

IN THE
Supreme Court of the United States

STATE OF MARYLAND,

Petitioner,

v.

ALONZO JAY KING, JR.,

Respondent.

On Writ of Certiorari
to the Court of Appeals of Maryland

BRIEF FOR THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS AMICUS CURIAE SUPPORTING RESPONDENT

SARAH S. GANNETT
Co-Chair,
Amicus Committee
NATIONAL ASSOCIATION
OF FEDERAL DEFENDERS
601 Walnut Street
Suite 540 West
Philadelphia, PA 19106

**Admitted only in Virginia; practicing under the supervision of principals of the firm*

WILLIAM M. JAY
Counsel of Record
JAMES P. ABELY
RACHEL I. FERSH
JOHN C. RAFFETTO
CHRISTINA L. HARRISON*
GOODWIN PROCTER LLP
901 New York Ave., NW
Washington, DC 20001
wjay@goodwinprocter.com
(202) 346-4000

February 1, 2013

QUESTION PRESENTED

Whether the Fourth Amendment permits the police to take the DNA of anyone who has been arrested for or charged with a crime and use it in an attempt to connect the arrestee to unrelated crimes, without a warrant or any individualized suspicion.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. Individuals Have A Reasonable Expectation Of Privacy In Their Bodies And Their Genetic Information, And The Government's Decision To Make An Arrest Does Not Diminish That Expectation. 6

A. Seizing DNA Unquestionably Implicates The People's Right To Be "Secure In Their Persons . . . Against Unreasonable Searches And Seizures." 6

B. The Mere Fact Of An Arrest Does Not Diminish Arrestees' Reasonable Expectation Of Privacy In Their Genetic Information. 7

C. Arrest Is Not A Permissible Basis For Conducting Searches Unrelated To The Arrest, Because Arrests Are Frequently Made By Unilateral Decisions Of Police And Prosecutors 23

II. The Government's Interest Cannot Overcome The Public's Reasonable Expectation Of Privacy In Their Own Bodies. 28

A. The Identification Rationale Does Not Support The Maryland Act. 28

B. The Law-Enforcement Rationale Is Inadequate To Justify Dispensing With Probable Cause And A Warrant. 30

CONCLUSION 33

TABLE OF AUTHORITIES

CASES: **PAGE**

Arizona v. Gant, 556 U.S. 332 (2009) 16, 18

Arizona v. Hicks, 480 U.S. 321 (1987) 6

Atwater v. City of Lago Vista, 532 U.S. 318 (2001) 20, 24

Bell v. Wolfish, 441 U.S. 520 (1979) 10

Chimel v. California, 395 U.S. 752 (1969) 17, 25

City of Indianapolis v. Edmond, 531 U.S. 32 (2000) 31

Colorado v. Bertine, 479 U.S. 367 (1987) 18

Delaware v. Prouse, 440 U.S. 648 (1979) 24

Ferguson v. City of Charleston, 532 U.S. 67 (2001) ... 31

Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510 (2012) 11

Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177 (2004) 19

Illinois v. Gates, 462 U.S. 213 (1983) 8

Locke v. United States, 11 U.S. (7 Cranch) 339 (1813) 8

Maryland v. Buie, 494 U.S. 325 (1990) 17

Mich. Dep't of State Police v. Sitz, 496 U.S. 444 (1990) 25

New York v. Belton, 453 U.S. 454 (1981) 18

Rivera v. Mueller, 596 F. Supp. 2d 1163 (N.D. Ill. 2009) 29

Schmerber v. California, 384 U.S. 757 (1966) 6, 18

Thornton v. United States, 541 U.S. 615 (2004) 3, 16

United States v. Jones, 132 S. Ct. 945 (2012) 32

United States v. Pavulak, 700 F.3d 651 (3d Cir. 2012) 22

United States v. Peck, 317 F.3d 754 (7th Cir. 2003) 22

United States v. Watson, 423 U.S. 411 (1976) 24

Wyoming v. Houghton, 526 U.S. 295 (1999) 18

STATUTES:

Criminal Justice Act, 18 U.S.C. § 3006A 1

16 U.S.C. § 374 21

18 U.S.C. § 13 21

18 U.S.C. § 711 21

18 U.S.C. § 1621(1) 21

18 U.S.C. § 2199 21

18 U.S.C. § 3299 27

42 U.S.C. § 14132(d)(1)(A)(ii) 27

42 U.S.C. § 14135a(a)(1) 10

42 U.S.C. § 14135a(a)(1)(A) 20

Ala. Code § 36-18-24(b)(6) 21

Ala. Code § 36-18-25(c)(1) 26

Alaska Stat. § 11.41.230 22
Alaska Stat. § 44.41.035 22
Alaska Stat. § 44.41.035(a)(6) 21, 26
Ariz. Rev. Stat. Ann. § 13-610(K) 26
Ark. Code Ann. § 12-12-1006(a)(1) 26
Cal. Penal Code § 296 26
Cal. Penal Code § 296(a)(2) 13
Cal. Penal Code § 296(a)(2)(C) 10, 21
Colo. Rev. Stat. § 16-23-103(1) 13, 21, 26
Colo. Rev. Stat. § 16-23-103(1)(b)(I) 10
Conn. Gen. Stat. § 54-102g 26
Fla. Stat. § 943.325(2)(g)(2)(c) 21
Fla. Stat. § 943.325(7) 26
Fla. Stat. § 943.325(16)(b) 27
Ill. Comp. Stat. § 5/5-4-3(f-1) 27
Kan. Stat. Ann. § 21-2511(3)(2) 21
Kan. Stat. Ann. § 21-2511(e) 13, 26
Kan. Stat. Ann. § 21-2511(e)(2) 10, 22
Kan. Stat. Ann. § 21-6412 22
La. Rev. Stat. Ann. § 14:37.3 22
La. Rev. Stat. Ann. § 15:609 22
La. Rev. Stat. Ann. § 15:609(A)(1) 21, 26
Md. Code Ann., Crim. Proc. § 10-105(c)(1) 27
Md. Code Ann., Pub. Safety § 2-504(a)(3)(i) 9

Md. Code Ann., Pub. Safety § 2-511(b) 27
Mich. Comp. Laws § 750.520m(1) 26
Mo. Rev. Stat. § 650.055(2) 26
N.D. Cent. Code § 31-13-03 26
N.D. Cent. Code § 31-13-03(1) 21
N.J. Stat. Ann. § 53:1-20.20(d) 26
N.M. Stat. Ann. § 29-16-6(B) 21, 26
Ohio Rev. Code Ann. § 2901.07(B) 13, 21, 26
Ohio Rev. Code Ann. § 2901.07(D) 10
S.C. Code Ann. § 23-3-620(A) 21
S.D. Codified Laws § 23-5A-5.2 ..... 21, 26
Tex. Gov't. Code Ann. § 411.1471(b) 26
Vt. Stat. Ann. tit. 20, § 1933(a) 21

OTHER AUTHORITIES:

Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts, 2011*, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf 24

Cal. Dep't of Justice, *Crime in California 2011: Crime Statistics for the Year 2011*, http://oag.ca.gov/sites/all/files/pdfs/cjsc/publications/candd/cd11/cd11.pdf 12, 13

Thomas H. Cohen, *Pretrial Release and Misconduct in Federal District Courts, 2008-2010* (2012), http://www.bjs.gov/content/pub/pdf/prmfdc0810.pdf.....31

Thomas H. Cohen & Tracey Kyckelhahn, Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2006* (2010) http://www.bjs.gov/content/pub/pdf/fdluc06.pdf 10

Executive Office for U.S. Att'ys, U.S. Dep't of Justice, *United States Attorneys' Annual Statistical Report: Fiscal Year 2011* (2011) http://www.justice.gov/usao/reading_room/reports/asr2011/11statrpt.pdf.....12

FBI, *Crime in the United States 2011—Table 29, Estimated Number of Arrests*, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-29 ..7-8

FBI, *The FBI and DNA* (Nov. 23, 2011), http://www.fbi.gov/news/stories/2011/november/dna_112311.....29

FBI Laboratory Services, U.S. Dep't of Justice, *CODIS Brochure*, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis_brochure. 29

FBI Laboratory Services, U.S. Dep't of Justice, *Frequently Asked Questions (FAQs) on the Codis Program and the National DNA Index System* (Nov. 23, 2011), http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet 29

Letter from Paul L. Jones, Director, Justice Issues, U.S. General Accounting Office, to Hon. Jerrold Nadler, *GAO-02-209R Limited "Voided Arrest" Data* (Nov. 30, 2001), http://www.gao.gov/assets/100/91050.pdf 13

Mark Motivans, Bureau of Justice Statistics, *Federal Justice Statistics, 2008—Statistical Tables* (2010), http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2008/fjs08st.pdf 12, 13

Mark Nelson, Nat'l Inst. of Justice, *Making Sense of DNA Backlogs—Myths v. Reality* (2011), http://www.ncjrs.gov/pdffiles1/nij/232197.pdf 30

Steven K. Smith & Mark Motivans, Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 2004* 17 http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs04.pdf. 21

Ronald F. Wright and Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. Rev. 1935 (2006) 14, 15

BRIEF FOR THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE AMICUS CURIAE[1]

The National Association of Federal Defenders ("NAFD") was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the Constitution. The NAFD is a nationwide, non-profit, volunteer organization. Its membership comprises attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act.

Among the NAFD's guiding principles is its commitment to promote fair adjudication in criminal matters by appearing as amicus curiae in cases of significant and recurring importance to indigent defendants. The question presented here implicates important liberty interests protected by the Fourth Amendment and recurs with significant frequency in the daily administration of criminal law and related prosecutions.

---

[1] The parties have consented to the filing of this brief. Documents reflecting the parties' consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus*, its members, and their counsel made any such monetary contribution.

SUMMARY OF ARGUMENT

The Constitution protects individuals' reasonable expectation that their genetic information will remain private from the government. An arrest does not diminish that protection. The deeply rooted right to be "secure in their persons . . . against unreasonable searches and seizures" does not end when individuals are accused of a crime. Just as the Fourth Amendment protects arrestees' homes and vehicles against suspicionless searches unrelated to the arrest itself, so too does it apply to an arrestee's DNA. If anything, the privacy interests are greater given the intrusion on personal dignity and bodily integrity that is at issue in the collection of DNA.

Empirical data forcefully show why the Constitution precludes treating a mere accusation or arrest as akin to a conviction as charged. The vast majority of arrestees are not ordered held in pretrial custody, but are granted bail or released before trial. Those arrestees who are held in custody are subjected to suspicionless searches only to carry out certain limited custodial functions, none of which implicates their genetic information. Most importantly, approximately one third of all felony arrestees will go free, because they are not charged, the charges are dismissed, or they are acquitted. Many more will be convicted only of a misdemeanor, or another count less serious than the initial charges. Thus, regardless of the nature of the crime charged, the data demonstrate that an arrest or accusation is not a reliable proxy for guilt.

Allowing the collection of DNA from arrestees absent individualized suspicion would be a significant

departure from prior precedent. It has long been the law that an arrest does not provide the government with the unlimited authority to search for evidence. A search incident to arrest is not a license for "general rummaging," *Thornton v. United States*, 541 U.S. 615, 630 (2004) (Scalia, J., concurring in the judgment); the search is limited to ensuring that the officers can effect the arrest without harm to themselves or destruction of evidence. Once an arrest has been safely made and the immediate danger has passed, the same constitutional rule applies to arrestees as to everyone else: the government must demonstrate probable cause to justify an evidentiary search of their "houses," their "effects," and, necessarily, their "persons." Indeed, the protection is significantly heightened for searches of one's person, especially those that go beyond the body's surface. Such protections are particularly applicable here: the mere chance that evidence of a separate, unrelated crime may be obtained does not justify the collection of an arrestee's DNA.

The Maryland statute, like other statutes in force in many jurisdictions, is simply an attempt to search for evidence while side-stepping the individualized suspicion requirement. Maryland and some other jurisdictions limit the collection to arrests for certain enumerated crimes; yet that limitation does not make the suspicionless search any more legitimate. Other jurisdictions are much broader and include arrests for all felonies; a combination of felonies and some misdemeanors; or, in the case of the federal government, all crimes generally. Accepting the categorical arguments that arrestees have lesser privacy would give the government the ability to search

any arrestee for evidence of involvement in any other unsolved crime.

These statutes also provide the government with virtually unconstrained discretion to obtain an individual's genetic information. The decision to arrest is frequently made by the unilateral decision of police and prosecutors. And more than two-thirds of jurisdictions with DNA-collection statutes permit the collection and use of DNA immediately, before any judicial officer has examined whether even probable cause exists. Accordingly, these statutes provide a perverse incentive for police and prosecutors to initiate arrests or to make charging decisions in order to collect an individual's DNA for investigative purposes. Many of these same jurisdictions continue to use the genetic information they collect even after an individual has been acquitted or for years after charges have been dropped.

The State's asserted interest in collecting DNA for use in the identification of arrestees is not credible and certainly cannot overcome arrestees' reasonable expectation of privacy. The Combined DNA Index System ("CODIS") used by many law-enforcement agencies was designed to compare known DNA samples against unknown samples collected from crime scenes—it is a tool for criminal investigation, not for identification. The State has also failed to provide any evidence showing that it needs the backlogged DNA-analysis labs to perform identifications that cannot already be speedily accomplished through established methods of identification such as fingerprinting.

With the supposed interest in identification off the table, the State is left with only its familiar, general interest in solving crimes. That interest is not and never has been a valid reason for a *suspicionless* search: evidentiary searches for law-enforcement purposes are precisely where Fourth Amendment protections apply most strongly. This rationale could support an almost unlimited range of intrusions on the right to privacy. The Court therefore should apply the customary Fourth Amendment protections in this co[illegible]ext, where the government is seeking to use an unadjudicated charge to justify a suspicionless search for use in investigating an unrelated crime.

ARGUMENT

Law-enforcement investigations are governed by a straightforward rule: to conduct a search, the police must obtain a warrant and probable cause. To justify a departure from that rule, the State here would have to show (1) that respondent was less entitled than the ordinary citizen to maintain the privacy of his body and his genetic information, *and* (2) that the State has a substantial interest in obtaining his genetic information that is separate and apart from the State's general interest in solving crimes. Because the State has not made either showing, the judgment of the Maryland Court of Appeals should be affirmed.

I. Individuals Have A Reasonable Expectation Of Privacy In Their Bodies And Their Genetic Information, And The Government's Decision To Make An Arrest Does Not Diminish That Expectation.

A. Seizing DNA Unquestionably Implicates The People's Right To Be "Secure In Their Persons . . . Against Unreasonable Searches And Seizures."

The State does not dispute that it "searched" respondent's person, in the Fourth Amendment sense, to obtain genetic information. *See* Pet. Br. 8; *accord* U.S. Br. 14. That means that unless the State can establish some exception to ordinary Fourth Amendment principles, its warrantless, suspicionless search was unconstitutional. "Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned." *Schmerber v. California*, 384 U.S. 757, 770 (1966).

In other words, as the State acknowledges, it cannot simply stop people on the street and demand their DNA without suspicion or a warrant. That settled proposition does not depend on how intrusive a method the State uses, because "[a] search is a search." *Arizona v. Hicks*, 480 U.S. 321, 325 (1987). Instead, the State must show that the individuals subject to the Act have a diminished expectation of privacy in their genetic information.

B. The Mere Fact Of An Arrest Does Not Diminish Arrestees' Reasonable Expectation Of Privacy In Their Genetic Information.

The State maintains that an individual charged with a crime has a lesser expectation of privacy in his genetic information. The State's argument is both incorrect and dangerous. The mere fact of an arrest cannot justify disregarding the arrestee's rights of personal dignity and bodily integrity. While a person who is arrested must expect to undergo certain types of custodial examinations, she retains the right to be free from all-purpose evidentiary rummaging that lacks any connection to the arrest or the reason for the arrest.

That principle—that an accusation does not diminish the accused's general expectation of privacy—does not vary based on the *nature* of the accusation. Maryland's statute collects DNA from anyone charged with specified felonies. The legal theory the State advances in this Court, however, would potentially sanction the practices in use in other jurisdictions: collecting DNA from anyone arrested for any felony on the books (as many other States do) or even for any *offense* on the books (as the United States does). None of these approaches establishes a likelihood of the arrestee's guilt, nor does any of them establish probable cause to search that person's genetic information.

Each year police in the United States make more than 12 million arrests. *See* FBI, *Crime in the United States 2011—Table 29, Estimated Number of Arrests*, http://www.fbi.gov/about-us/cjis/ucr/crime-in-

the-u.s/2011/crime-in-the-u.s.-2011/tables/table-29. Approximately a third of those 12 million arrestees will never be convicted, and many more will be convicted of lesser charges than those for which they were arrested. Yet Maryland's *reasoning* would apply equally to all 12 million of them—even those the State never successfully prosecutes. Accepting that reasoning would drastically expand the State's power over millions of individuals merely because the State has accused them of a crime. This Court should reject that assertion of power.

1. Arrest Is Not A Sufficiently Reliable Proxy For Guilt.

People who are arrested are presumed innocent. A lawful arrest merely reflects probable cause to believe, at the time of arrest, that the arrestee has committed a crime. And probable cause is hardly certainty. As Chief Justice Marshall observed, "'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation." *Locke v. United States*, 11 U.S. (7 Cranch) 339, 348 (1813). It is not a "[f]inely-tuned standard[] such as proof beyond a reasonable doubt." *Illinois v. Gates*, 462 U.S. 213, 235 (1983).

In this case, however, the State seeks to treat arrest as tantamount to conviction. That is shown most starkly in Maryland's reliance on this Court's cases involving the limited expectation of privacy a person retains while serving a term of probation or parole—*i.e.*, after being adjudicated guilty of an offense. *See* Pet. Br. 12-13, 16-17 (relying on *Samson v. California*, 547 U.S. 843, 850 (2006)).

The State never actually explains *why*, in its words, "[l]awful arrest fundamentally changes the nature of the individual's physical relationship to the State, and correspondingly diminishes the individual's reasonable expectation of privacy." Pet. Br. 17; *see also* U.S. Br. 14 (asserting, in a single sentence, that "[a]n arrest based on probable cause significantly reduces an individual's privacy interest"). The State's reasoning appears to turn on custody: parolees and probationers are not incarcerated; arrestees may be in state custody; *ergo*, the State apparently contends, arrestees have even less expectation of privacy than a parolee or a probationer. Pet. Br. 17. If this is the State's logic, then it falls short.

a. Charging Does Not Mean Custody.—Bringing charges against an individual does not give the State a custodial interest in that individual's DNA. Charging does not equal arrest, and arrest does not equal incarceration.

As an initial matter, the Maryland statute directs the police to collect a DNA sample "from an individual who is *charged* with" a specified offense. Md. Code Ann., Pub. Safety § 2-504(a)(3)(i) (emphasis added); Pet. App. 19a n.16. Throughout its brief Maryland repeatedly equates charging with arrest. But some charges are brought by summons and never lead to a custodial arrest. Even if Maryland routinely arrests individuals charged with the offenses listed in its DNA-testing statute, the same cannot be said of all jurisdictions that employ such statutes. The federal government, for example, collects DNA from individuals who are charged, in any fashion, with any crime—including a summons to appear to

answer charges of a misdemeanor or even an infraction. *See* 42 U.S.C. § 14135a(a)(1).[2]

Even those who are arrested are often not held in custody throughout the pretrial period. Many are never really behind bars at all, but are held only to complete the booking process. In fact, only a small fraction of defendants are denied bail and ordered to remain in custody until trial. *See, e.g.*, Thomas H. Cohen & Tracey Kyckelhahn, Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2006*, at 25 app. tbl.8 (2010) http://www.bjs.gov/content/pub/pdf/fdluc06.pdf (*Felony Defendants*) (only 5% of felony defendants in the sample of more than 46,000 were denied bail).[3] And the State does not identify any legitimate custodial function (such as prison safety) that the seizure of genetic information would carry out. *See, e.g.*, *Bell v. Wolfish*, 441 U.S. 520, 546 (1979) (constitutional rights of prisoners may be limited by "the legitimate goals and policies of the penal institution" where they are confined, such as "maintaining internal security and preserving institutional order and discipline"). The State already has ample authority to search the person of an arrestee for weapons that might hurt the

---

[2] Several States likewise collect DNA based on charging rather than arrest. *See, e.g.*, Cal. Penal Code § 296(a)(2)(C); Colo. Rev. Stat. § 16-23-103(1)(b)(I); Kan. Stat. Ann. § 21-2511(e)(2); Ohio Rev. Code Ann. § 2901.07(D).

[3] The overwhelming majority were either released on their own recognizance; released on nonfinancial conditions; or granted bail, although not every defendant is financially able to post bail. *See Felony Defendants* 25 app. tbl.8 (finding that 25% of felony defendants were released on their own recognizance or on nonfinancial conditions and 70% had bail set, of which just under half posted bail and were released).

officer, or conduct a more intensive search before an individual is placed in the general population of a jail. *See, e.g., Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1522-23 (2012); *id.* at 1524-25 (Alito, J., concurring).

In addition to arguing that people held in custody have reduced expectations of privacy, the State also seeks to rely on the nature of the arrest itself. It contends that "[p]eople *arrested for violent crimes* have reduced expectations of privacy generally." Pet. Br. 16 (emphasis added; italics omitted). The State's theory is that the mere leveling of the accusation of a "serious crime[]" (Pet. for Cert. i and 13 n.5) opens the door to a suspicionless exploration of what *else* he may have done.

That contention fails. Where no custodial function is at stake, the arrest does not "fundamentally change[]" an arrestee's "general[]" Fourth Amendment rights, for the simple reason that, in our system, arrestees have not been adjudicated to be guilty of anything. Thus, even if it were correct (and it is not) that individuals convicted of "serious crimes" forfeit some greater degree of privacy against government intrusion than other convicts, an *arrest* for a serious crime is not a sufficient proxy. Arresting an individual for a particular offense—a decision that may be made on the spot by a single officer—does not reliably predict whether the individual will ultimately be convicted for that offense.

b. Charging Does Not Mean Guilt.—Large-scale studies have found that approximately one out of every three felony arrestees will go free. *See, e.g., Felony Defendants* at 11 tbl.11 (finding that only 68%

of defendants charged with felonies in the nation's 75 largest counties were convicted of any offense); Executive Office for U.S. Att'ys, U.S. Dep't of Justice, *United States Attorneys' Annual Statistical Report: Fiscal Year 2011*, at 14-15 (2011), http://www.justice.gov/usao/reading_room/reports/asr2011/11statrpt.pdf (reporting 3285 felony convictions obtained by federal prosecutors in District of Columbia Superior Court and 5175 felony arrests, a rate of 63%); Cal. Dep't of Justice, *Crime in California 2011: Crime Statistics for the Year 2011*, at 2, 49 tbl.37, http://oag.ca.gov/sites/all/files/pdfs/cjsc/publications/candd/cd11/cd11.pdf (*Crime in California 2011*) ("In 2011, 67.0 percent of adult felony arrests resulted in conviction.").

In a single year, California alone arrested approximately 140,000 "alleged felons" who ultimately were not convicted of *anything*. *See id.* at 16 tbl.16 (419,914 felony arrests in California that year). Extrapolated nationwide, those proportions would indicate that approximately 4 *million* arrests never lead to a conviction (that is, one-third of the approximately 12 million arrests made each year in the United States).

Some of these figures likely understate the true numbers. A substantial number of arrests never lead to the initiation of criminal charges at all. *See, e.g.*, Mark Motivans, Bureau of Justice Statistics, *Federal Justice Statistics, 2008—Statistical Tables* tbls.2.2 & 2.3 (2010), http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2008/fjs08st.pdf (*Federal Justice Statistics, 2008*) (in fiscal year 2008, federal prosecutors declined prosecution in more than 28,000 cases, 15.4% of all matters concluded that year); *Crime in*

California 2011, at 49 tbl. 37 (either law enforcement or prosecution released more than 50,000 arrestees without filing charges—19% of all arrestees whose cases were resolved).[4] This category is omitted from statistical compilations that begin their analysis at the initiation of a criminal judicial proceeding rather than the defendant's arrest. Yet it is a highly relevant category as the Court considers whether an arrest alone can diminish the arrestee's expectation of privacy in his genetic information.[5] In the federal system alone, prosecutors decline to prosecute a substantial number of cases each year based on either a conclusion that the defendant has committed no crime (*e.g.*, because he lacked criminal intent), or that the defendant could not be convicted at trial. *See Federal Justice Statistics, 2008* tbl. 2.3 (reporting that 47.6% of declinations were based either on the prosecutor's conclusion that "no crime" occurred—

---

[4] Statistical information about arrests that never lead to prosecution is difficult to come by. *See* Letter from Paul L. Jones, Director, Justice Issues, U.S. General Accounting Office, to Hon. Jerrold Nadler, *GAO-02-209R Limited "Voided Arrest" Data* 5 (Nov. 30, 2001), http://www.gao.gov/assets/100/91050.pdf.

[5] Numerous States collect DNA from everyone who is arrested, not merely those who are ultimately charged. *See, e.g.*, Cal. Penal Code § 296(a)(2); Colo. Rev. Stat. § 16-23-103(1); Kan. Stat. Ann. § 21-2511(e); Ohio Rev. Code Ann. § 2901.07(B). Indeed, as discussed below, many of these States refuse to expunge the DNA from its records *even after prosecution is declined*, until the statute of limitations expires—likely years later, or in a few instances, never. *See infra* p. 27 & n.13.

often because of a lack of criminal intent—or on "weak evidence").[6]

c. Charging Does Not Mean Conviction As Charged.—Even if an arrestee is later convicted of *something*, that fact does not show that the initial charge was accurate. Maryland brings the case to this Court as a case only about "serious crimes." Pet. for Cert. i. The State emphasizes that Maryland does not take DNA from misdemeanants or those charged with misdemeanors; the same is true of most of the *amici* States, and none of them takes genetic information from *all* misdemeanor arrestees (although the federal government does). But it bears repeating that respondent was not convicted of a "serious crime" as Maryland uses the term. *See* Pet. App. 4a n.3. Respondent would not even be here if he had been arrested for the crime of which he was convicted. *See also infra* p. 26.

Respondent's situation is hardly unique. Many defendants who are charged with felonies end up convicted only of misdemeanors. One statewide study examined felony arrests ending in a conviction and determined that more than one-third of the convictions were only misdemeanors. *See* Ronald F. Wright and Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. Rev. 1935, 1958 tbl.1 (2006) (Wright & Engen) (finding 15,144 misdemeanor convictions out of 41,661 felony arrests ending in conviction, or 36.4%); *see also, e.g.*, *Felony*

---

[6] Moreover, some felony arrests do result in charges, but only at the misdemeanor level, and so are not counted in felony statistics at all.

Defendants 11 tbl.11 (in 75 large urban counties, of felony defendants who were convicted, approximately one-sixth were convicted of misdemeanors).

The figures are particularly striking for felony assault, the offense with which respondent was initially charged but not convicted. The most recent federal study of large urban jurisdictions found that a majority of felony-assault prosecutions failed to yield a felony conviction. Only 40% of defendants charged with felony assault were actually convicted of a felony (any felony); 14% were convicted of misdemeanors; and 41% were not convicted of anything. *Felony Defendants* 11 tbl.11. A private statewide study found an even greater disparity: even looking only at felony assault charges that produced *some* kind of conviction, nearly half (48%) resulted in only a misdemeanor conviction. Wright & Engen 1960 tbl.2.

Even the statistics for defendants who are both charged with a felony and convicted of a felony may be misleading, because the charge and the conviction often are not for the *same* felony. *See Felony Defendants* 11 fig.7. In the statewide study discussed above, of the most serious felony charges resulting in convictions, fewer than 20% resulted in conviction on the top count. *See* Wright & Engen 1958 tbl.1 (detailing disposition of charges that included a B1 class felony and resulted in some kind of conviction).

These studies demonstrate the flaws in the State's attempt to distinguish between suspicionless DNA sampling of arrestees and DNA sampling of the general public. Arresting someone for a "serious crime" simply does not establish that he may be treated, *for*

all Fourth Amendment purposes, as a "serious criminal" before he is convicted.

2. Arrest Is Not A License For Law Enforcement To Engage In "General Rummaging" For Evidence.

Arresting an individual in his home does not authorize the police to search the home for evidence without a search warrant. Arresting an individual in his car does not entitle the police to open the car trunk and hunt for evidence of some unrelated, unsuspected crime. Precisely the same principle should apply here: arresting an individual does not authorize the police to search his genetic information for clues to any and every open case on the books.

Contrary to the State's broad assertion (at 17) that an arrest "fundamentally changes the nature of the individual's physical relationship to the State," once the arrest is safely made there is no basis for *any* change in the protection accorded to individuals' "persons, houses, papers and effects." This Court has repeatedly rejected government attempts to leverage an arrest into a blanket authorization to search for evidence. Even where (unlike here) exigency or some similar circumstance justifies dispensing with the warrant requirement, the government must still demonstrate individualized suspicion to "distinguish[] a search for evidence of [the offense of arrest] from general rummaging." *Thornton*, 541 U.S. at 630 (Scalia, J., concurring in the judgment); *cf. Arizona v. Gant*, 556 U.S. 332, 343-44 (2009). The Maryland statute, by contrast, is the *ne plus ultra* of general rummaging.

This Court long ago rejected the notion that the mere fact of an arrest can negate the arrestee's reasonable expectation of privacy in his person, house, papers and effects. That was the holding of *Chimel v. California*, 395 U.S. 752 (1969), in which the Court squarely held that arresting Chimel in his home, pursuant to an arrest warrant, did not justify searching Chimel's entire house—not even for evidence of Chimel's alleged crime. *See id.* at 767-68. The Court agreed that the arrest could justify a search of the area within which Chimel could grab a weapon or an easily-destroyed piece of evidence. *Id.* at 766, 768; *see also Maryland v. Buie*, 494 U.S. 325, 335 n.3, 336 (1990) (allowing a protective sweep of an arrestee's home, based on less than probable cause, only when "necessary to protect the safety of officers and others"). But the Court squarely rejected the notion "that once an arrest has been made, the additional invasion of privacy stemming from the accompanying search is 'relatively minor.'" *Chimel*, 395 U.S. at 766 n.12. The search of the entire house was no minor intrusion, and the Court "c[ould] see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require." *Id.*

Similarly, an arrest in a car does not make the entire car subject to suspicionless search. Indeed, this Court has given extensive consideration to precisely when searches of the passenger compartment may be

justified by officer safety. *See, e.g., Gant, supra.*[7] Those cases would have been simple if the mere fact of the arrest justified any search that the State desired. But an arrestee's expectation of privacy in the car trunk, or anywhere else that clearly does not implicate the officer-safety concern, still cannot be compromised without probable cause, irrespective of the arrest. *See, e.g., New York v. Belton*, 453 U.S. 454, 461 n.4 (1981).

The rule for one's "person" is no less protective than the rule for one's "house," "papers," or "effects." *See Schmerber*, 384 U.S. at 769 ("[T]he mere fact of a lawful arrest does not end our inquiry."). To the contrary: this Court has recognized the "unique, significantly heightened protection afforded against searches of one's person." *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999). Accordingly, while this Court has upheld certain bodily searches *based on probable cause*, derived from the same facts as the arrest, it has cautioned that "the mere chance that desired evidence might be obtained" is not enough to justify "intrusions beyond the body's surface." *Schmerber*, 384 U.S. at 769-70. "[M]ere chance" aptly describes the State's basis for the search here.

This long line of cases illustrates just how unprecedented an exception the State is seeking from the warrant and probable-cause requirements. The

---

[7] The Court has also considered when the contents of an arrestee's car may be inventoried "according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity." *Colorado v. Bertine*, 479 U.S. 367, 375 (1987). That limitation would have no relevance if the arrest itself provided enough basis to search the car for "evidence of criminal activity."

State's unsupported assertion that any lawful arrest "mark[s] a general reduction in an individual's expectation of privacy" (Pet. Br. 18) wholly disregards the limitations that this Court has emphasized on searches incident to arrest in every context—from searches of vehicles, to searches of the home, to searches of the human body. A person who is arrested may well be subject to a search that is truly "incident" to the arrest. But he is not subject to whatever poking and prodding the State deems expedient.

Nor can the State circumvent these longstanding principles by contending that it is searching for evidence of "identity." *See infra* pp. 28-30. Arresting an individual in his home does not entitle the police to go through his papers looking for his birth certificate or passport—even if the police contend that the document is necessary to ascertain the individual's *true* identity. And even if there were some special no-privacy rule for evidence of identity, here the State is using "identity" in a highly unusual sense—to include not just the individual's name, but also "his participation in other crimes." Pet. Br. 18. That absurdly broad definition would expand "identity" beyond any recognizable Fourth Amendment limit. *Cf. Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 178-79 (2004) (equating a suspect's identity with his name).

3. The Maryland DNA Statute, Like The Even Broader Statutes In Force In Many Other Jurisdictions, Constitutes Impermissible "General Rummaging."

The State makes the bald assertion that "[p]eople arrested *for violent crimes* have reduced expectations of privacy generally." Pet. Br. 16 (emphasis added; italics omitted); *see also* Pet. for Cert. i (limiting the question presented to those arrested for "serious crimes"). But it makes no effort to argue that the seriousness of the crime charged does any work in the analysis. Neither Maryland nor any other State suggests that the mere fact of an arrest—serious or otherwise—actually creates individualized suspicion that the arrestee has committed another crime for which DNA evidence might be useful. Rather, DNA testing based on arrest is the epitome of a completely suspicionless search.

Accepting Maryland's broader reasoning would also sanction other, even more aggressive statutes currently in force around the Nation. This Court has declined to recognize any constitutional limit on what offenses may be the basis for custodial arrest. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). Accordingly, if the mere fact of arrest is enough, then the only limit on searches of genetic information is what offenses Congress and the state legislatures opt to include.

Congress has already staked out an aggressive position: the federal government may subject *any* "individuals who are arrested [or] facing charges" to DNA testing. 42 U.S.C. § 14135a(a)(1)(A). This statute is remarkably overbroad. It includes federal

felonies that are unlikely to involve either violence or recidivism, ranging from perjury to stowing away on a ship. *See* 18 U.S.C. §§ 1621(1), 2199. It includes every enumerated federal misdemeanor, including the unauthorized use of the "Smokey Bear" character or unauthorized bathing in the water within Hot Springs National Park. *See* 18 U.S.C. § 711; 16 U.S.C. § 374. But that is not all: on federal property, such as every veterans' hospital or national park, every crime is a federal crime, even those that are punishable only as infractions. Federal law borrows state law for some of these offenses, while others are criminalized by broad regulations. *See* 18 U.S.C. § 13. Thousands of people each year are arrested and booked for traffic-related offenses on federal property. *See* Steven K. Smith & Mark Motivans, Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 2004* 17 tbl.1.1, http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs04.pdf. As a result, countless low-grade regulatory offenses—including traffic offenses on the George Washington Parkway or the Baltimore-Washington Parkway—may result in DNA testing.

The state legislatures, too, have swept broadly in subjecting arrestees to DNA testing. Of the States that test arrestees, nearly half test *all* felony arrestees.[8] And while the remaining States have at

---

[8] *See* Ala. Code § 36-18-24(b)(6); Alaska Stat. § 44.41.035(a)(6); Cal. Penal Code § 296(a)(2)(C); Colo. Rev. Stat. § 16-23-103(1); Fla. Stat. § 943.325(2)(g)(2)(c); Kan. Stat. Ann. § 21-2511(3)(2); La. Rev. Stat. Ann. § 15:609(A)(1); N.M. Stat. Ann. § 29-16-6(B); N.D. Cent. Code § 31-13-03(1); Ohio Rev. Code Ann. § 2901.07(B); S.C. Code Ann. § 23-3-620(A); S.D. Codified Laws § 23-5A-5.2; Vt. Stat. Ann. tit. 20, § 1933(a).

least enumerated the offenses subject to DNA testing, those specifically enumerated offenses include such misdemeanors as unlawful use of a laser pointer on a police officer, *see* La. Rev. Stat. Ann. §§ 15:609, 14:37.3; cruelty to animals, *see* Kan. Stat. Ann. §§ 21-2511(e)(2), 21-6412; and fourth-degree assault, *see* Alaska Stat. §§ 11.41.230, 44.41.035.[9]

These statutes rest on the notion that anyone arrested for a crime can be searched for evidence of involvement in *every other unsolved crime* (or at least those for which there is DNA evidence). The federal courts have consistently rejected similar arguments based on convictions: the mere fact that a person has previously been convicted of a crime is never sufficient, *standing alone*, to justify searching him for evidence of an identified but unrelated crime. *See, e.g.*, *United States v. Pavulak*, 700 F.3d 651, 666 (3d Cir. 2012) (holding that prior convictions do not establish probable cause for a search warrant for a "wholly separate crime"); *United States v. Peck*, 317 F.3d 754, 757 (7th Cir. 2003) (holding that police must do more than simply run a criminal record check of the accused to merit the issuance of a search

---

[9] The overinclusiveness of the current set of state statutes exacerbates the danger arising from the fact that DNA testing is an entirely suspicionless endeavor. Neither Maryland nor its *amici* States present any basis for thinking that (for example) Louisiana's laser-pointer offense is any more or less likely to involve recidivism, or DNA evidence, than any of the other offenses that trigger DNA testing. If these statutes rest on anything other than legislative speculation about which types of crimes sound serious, Maryland and its *amici* have not offered it.

warrant). Yet here the States want to use an *unadjudicated* arrest to justify a *suspicionless* search for use in investigating *undifferentiated* other crimes. Such a search is not in any way incident to the arrest; as a result, it does not fall within any exception to the warrant and probable-cause requirements.

C. Arrest Is Not A Permissible Basis For Conducting Searches Unrelated To The Arrest, Because Arrests Are Frequently Made By Unilateral Decisions Of Police And Prosecutors.

No judicial officer approved arresting respondent. The decision was made by a single officer of the Salisbury Police Department. *See* Resp. Br. 1a-6a. Maryland contends that the officer's decision distinguishes respondent from the ordinary citizen on the street, for purposes of the privacy of his generic information. But any rule allowing police to test whomever they arrest will inevitably begin to skew who gets arrested. And any rule that makes this investigative tool available, but conditions it on asserting particular charges, will only encourage prosecutors to seek those charges. The fact that those decisions are ultimately reviewed by a judge or jury is an insufficient safeguard: the government keeps, and repeatedly searches, the arrestee's genetic information in the meantime, which may be a period of years while the statute of limitations runs. The State does not comply with the Constitution merely by abandoning its efforts to keep the DNA once the charge is thrown out; the rejection of the charge is powerful evidence that the State never should have had the DNA in the first place.

Many, and possibly most, arrests are made without prior judicial approval.[10] Although state-law arrest authority varies by jurisdiction, the Fourth Amendment gives officers considerable leeway to make warrantless arrests for crimes committed in their presence. *Atwater*, 532 U.S. at 354 ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."); *United States v. Watson*, 423 U.S. 411, 417 (1976). That was the case here.

The State contends that the officer's probable cause decision—often made alone, in the field, and under pressure—made all the difference in transforming respondent from an individual whose genetic information may not be searched to an arrestee whose information *may* be searched. But that reasoning is wholly contrary to customary Fourth Amendment analysis, which recognizes that the power to order a suspicionless search cannot be left in the unbounded discretion of government agents.

This Court has recognized the danger of leaving "standardless and unconstrained discretion" in the hands of police officers. *Delaware v. Prouse*, 440 U.S. 648, 661 (1979) (holding that police could not make traffic stops to check drivers' licenses without rea-

---

[10] A majority of federal prosecutions are initiated without a judicial officer signing an arrest warrant. *Compare* Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts, 2011*, at 195 tbl.D, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf, *with id.* at 355 tbl.M-3. The number appears to be even higher on the state level.

sonable suspicion); *cf. Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 452 (1990) (upholding sobriety checkpoints because, unlike the "'standardless and unconstrained discretion'" in *Prouse*, "checkpoints [we]re selected pursuant to [written] guidelines, and uniformed police officers stop[ped] every approaching vehicle"). Where a search is truly incident to an arrest supported by probable cause, that concern may lack some of the same force. But here, where the arrest has no necessary connection to the need for or investigative use of the DNA sample, the arrest cannot justify an otherwise-impermissible search.

Moreover, this Court has cautioned on a number of occasions that it will not craft Fourth Amendment rules that give government agents perverse incentives. *See, e.g.*, *Chimel*, 395 U.S. at 767. Yet that would be the result of the State's position. A rule that allows prosecutors and police to deploy this tool to gain an evidentiary advantage will simply encourage prosecutors and police to exercise their discretion in ways that maximize the evidentiary advantage. *Id.* (if search incident to arrest justified search of the entire house, many more arrests would occur in homes rather than elsewhere). The incentives to arrest, book, and sample—and often then to release—the defendant would be considerable.

Prosecutors, too, would feel these incentives. The most serious count in the charging document will likely determine whether or not the arrest qualifies for DNA sampling. The same is true in every State, because every State has at least some crimes (*e.g.*, misdemeanors) for which they do not currently authorize DNA sampling. In cases in which the most serious potential charge is on the margin—for exam-

ple, cases that turn on an assessment of the defendant's subjective intent—the prosecutor may feel intense pressure to charge the defendant under the more serious provision in order to obtain the DNA sample. As noted above, respondent was charged with a crime that required taking his DNA, but was never convicted of that crime; he was convicted only of a misdemeanor. *See supra* p. 14.

Maryland emphasizes that under its statutory framework, it does not even examine genetic information until after a judicial officer has ruled that there was probable cause to arrest. But of the other States that take DNA from arrestees, *two-thirds* do not abide by any such restriction. Rather, those States can begin using the genetic information for investigative purposes as soon as they can process the DNA sample.[11] And in any event, as discussed above, a ruling that there is probable cause to arrest falls well short of a reliable prediction of guilt.

In addition, jurisdictions that take DNA from arrestees may keep the genetic information for a long while. Eighteen States keep the DNA even if the defendant is acquitted, unless and until the defendant seeks expungement—which, in several States, re-

---

[11] *See* Ala. Code § 36-18-25(c)(1); Alaska Stat. § 44.41.035(a)(6); Ariz. Rev. Stat. Ann. § 13-610(K); Ark. Code Ann. § 12-12-1006(a)(1); Cal. Penal Code § 296; Colo. Rev. Stat. § 16-23-103(1); Conn. Gen. Stat. § 54-102g; Fla. Stat. § 943.325(7); Kan. Stat. Ann. § 21-2511(e); La. Rev. Stat. Ann. § 15:609(A)(1); Mich. Comp. Laws § 750.520m(1); Mo. Rev. Stat. § 650.055(2); N.D. Cent. Code § 31-13-03; N.J. Stat. Ann. § 53:1-20.20(d); N.M. Stat. Ann. § 29-16-6(B); Ohio Rev. Code Ann. § 2901.07(B); S.D. Codified Laws § 23-5A-5.2; Tex. Gov't. Code Ann. § 411.1471(b).

quires him to file a formal petition in a court of record.[12] Because the petition will come only after the criminal case is over, it is questionable whether indigent defendants will be able to secure counsel to assist them with this extremely important collateral proceeding.

Furthermore, as noted above, many arrests do not lead to charges being filed. But under federal law and the law in several States, a prosecutor's decision not to file charges is insufficient to get the DNA sample expunged: individuals who were arrested but not charged must wait until the statute of limitations has expired before they may seek expungement. *See, e.g.*, 42 U.S.C. § 14132(d)(1)(A)(ii).[13] During that time—which may, in fact, be forever, *see* 18 U.S.C. § 3299—the individual's DNA continues to be regularly searched through CODIS.

These procedures get the constitutional balance precisely backwards. In agreeing to remove DNA from the database if a defendant is not convicted, Maryland and the other States effectively acknowledge that their statutes will result in collecting DNA from people who have not, in fact, commit-

---

[12] Due to a sunset provision, absent new legislation, Maryland law will change next year: it will require the arrestee to request such expungement by filing a petition in court—and to either wait until *three years* after the acquittal of record, or waive all tort claims associated with the prosecution. *See* Md. Code Ann., Pub. Safety § 2-511(b) (effective Jan. 1, 2014) (incorporating the procedure for expunging a conviction); Md. Code Ann., Crim. Proc. § 10-105(c)(1).

[13] *Accord, e.g.*, Fla. Stat. § 943.325(16)(b) (providing for expungement if "no charge was filed within the applicable time period"); Ill. Comp. Stat. § 5/5-4-3(f-1) (same).

ted any serious crime. But the presumption should run the other way: instead of acquiring the DNA upon arrest, and then keeping that DNA until compelled to expunge it, the States should be required to secure the DNA only after the defendant has been convicted—a procedure that has both a higher burden of proof and a greater degree of certainty.

II. The Government's Interest Cannot Overcome The Public's Reasonable Expectation Of Privacy In Their Own Bodies.

The State has identified two interests at stake: identification of arrestees, and solving unsolved crimes. The first is not credible, and the second is not proper. In practice, DNA is not used for identification purposes. As for the interest in law enforcement, the desire to solve more crimes has never been sufficient to overcome a reasonable expectation of privacy under the Fourth Amendment. And, in any event, testing upon conviction rather than arrest will have only a marginal effect on database efficacy.

A. The Identification Rationale Does Not Support The Maryland Act.

The State's argument that it has an interest in using arrestees' DNA for identification that outweighs arrestees' reasonable expectation of privacy (Pet. Br. 21-23) are belied by the simple fact that the government does not use the collected DNA samples to establish identification. Indeed, the State fails to provide a single example of DNA being used to establish the identity of an arrestee, much less any evidence

supporting the need for its use for identification on a widespread basis.

CODIS is maintained by the FBI and used by 190 law-enforcement laboratories across the country. *See* FBI Laboratory Services, U.S. Dep't of Justice, *CODIS Brochure*, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis_brochure. CODIS maintains several indices of DNA profiles, including a Convicted Offender Index, Arrestee Index, and a Forensic Index. *Id.* By the FBI's own description, CODIS was designed not for use in identification, but to provide "investigative information in those cases in which crime scene evidence has yielded a DNA profile but no suspect has been identified." FBI Laboratory Services, U.S. Dep't of Justice, *Frequently Asked Questions (FAQs) on the Codis Program and the National DNA Index System* (Nov. 23, 2011), http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet. In fact, CODIS is not suitable for use in identification: "[n]o names or other personal identifiers of the offenders, arrestees, or detainees are stored using the CODIS software." *Id.* Even if such information were available in CODIS, the searches run by CODIS would not be of any practical use in identifying arrestees: it searches only weekly, and does not compare samples to known arrestee or offenders, but to biological samples found at the crime scene.[14]

---

[14] *See* FBI, *The FBI and DNA* (Nov. 23, 2011), http://www.fbi.gov/news/stories/2011/november/dna_112311; *Rivera v. Mueller*, 596 F. Supp. 2d 1163, 1166 (N.D. Ill. 2009) ("The CODIS software automatically runs a search on a weekly basis to identify potential matches between biological samples found at crime scenes and offenders whose DNA samples are already

Fingerprinting has been and remains the primary method by which law enforcement has established the identity of an arrestee. Fingerprinting is not subject to the significant delays in processing that a DNA analysis typically involves. *See* Mark Nelson, Nat'l Inst. of Justice, *Making Sense of DNA Backlogs—Myths v. Reality* 7 (2011), http://www.ncjrs.gov/pdffiles1/nij/232197.pdf ("Delays and backlogs in testing convicted offender and arrestee samples and uploading their DNA profiles into CODIS limit the potential to identify suspects."). And law enforcement does with fingerprints precisely what it does *not* do with DNA: it routinely compares the fingerprints of newly booked arrestees with the fingerprints of other people already catalogued in the system by name to confirm their identities and criminal histories.

B. The Law-Enforcement Rationale Is Inadequate To Justify Dispensing With Probable Cause And A Warrant.

The State also argues that it needs to collect DNA at the arrest stage, not the conviction stage, to "solv[e] crimes as expeditiously as possible." Pet. Br. 23-25 (italics omitted). Even if the State were right that arrestees have a lesser expectation of privacy, the State's interest still would not be sufficient to

---

in the system."). *See also* Declaration of Douglas R. Hares, *Rivera v. Mueller*, No. 08-CV-6185 (N.D. Ill. Jan. 12, 2009) (Dkt. No. 25-3) ("The CODIS software performs this function by automatically running a search of all data contained in NDIS on a weekly basis, in order to identify potential matches between forensic unknowns . . . and offenders already contained in the system.").

justify subjecting individuals to warrantless, suspicionless seizure of their genetic information. While it is true that "[t]he detection and punishment of almost any criminal offense serves broadly the safety of the community," *City of Indianapolis v. Edmond*, 531 U.S. 32, 43 (2000), the Fourth Amendment's protections are supposed to be at their highest in the context of criminal investigations. *See id.* ("We are particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends."). Thus, when this Court has allowed searches absent individualized suspicion, it has done so for "special need[s]" that were "divorced from the State's general interest in law enforcement." *Ferguson v. City of Charleston*, 532 U.S. 67, 79 (2001). By contrast, suspicionless searches purely for law-enforcement purposes are presumptively invalid.

In any event, the State and its *amici* overstate the need to take genetic information from arrestees. As the States emphasize, many arrestees are recidivists: not only have they been arrested before, but by definition, they have been *convicted* before, and are already in the system. [15]

If a defendant is *not* convicted, Maryland acknowledges that it should not have his DNA on file in any

---

[15] Between 2008 and 2010, 74,879 out of 283,358 defendants in federal court (26%) had never been arrested before. *See* Thomas H. Cohen, *Pretrial Release and Misconduct in Federal District Courts, 2008-2010* 9 tbl.8 (2012), http://www.bjs.gov/content/pub/pdf/prmfdc0810.pdf. Applying this percentage to the FBI's national arrest statistics, over 3 million arrestees in 2011 might have been first-time arrestees.

event. And if the defendant *is* convicted, the State will be able to obtain his DNA, after (on average) only a modest delay. In a recent study of prosecutions in large urban counties, the median time from arrest to adjudication was 92 days, 71% of cases had been adjudicated within six months, and 88% had been adjudicated within one year. *Felony Defendants* tbl.10.

* * * * *

In this relatively new technological area, "[t]he best that we can do . . is to apply existing Fourth Amendment doctrine." *United States v. Jones*, 132 S. Ct. 945, 964 (2012) (Alito, J., concurring in the judgment). Individual arrestees do not have a diminished expectation of privacy in any sense relevant to the question presented here. To accept the State's reasoning would be to place arrestees on the same footing as convicts despite the fact that more than one out of every three felony arrestees walks free. The government's need to test arrestees is modest at best. And the alternative—to adhere to the traditional requirements of warrant and probable cause—is eminently workable; a prosecutor who needs to obtain a suspect's DNA for investigative purposes can obtain a warrant specifically directed to DNA testing. *if* she can show probable cause to conduct the search. That is what the Fourth Amendment has required for more than 200 years. Maryland presents no basis for an exception.

CONCLUSION

The judgment of the Maryland Court of Appeals should be affirmed.

Respectfully submitted.

SARAH S. GANNETT
Co-Chair,
Amicus Committee
NATIONAL ASSOCIATION
OF FEDERAL DEFENDERS
601 Walnut Street
Suite 540 West
Philadelphia, PA 19106

WILLIAM M. JAY
Counsel of Record
JAMES P. ABELY
RACHEL I. FERSH
JOHN C. RAFFETTO
CHRISTINA L. HARRISON*
GOODWIN PROCTER LLP
901 New York Ave., NW
Washington, DC 20001
wjay@goodwinprocter.com
(202) 346-4000

* *Admitted only in Virginia; practicing under the supervision of principals of the firm*

February 1, 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEF

No. 12-207

Supreme Court, U.S.
FILED
DEC 28 2012
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MARYLAND,

Petitioner,

v.

ALONZO JAY KING, JR.,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of Maryland

BRIEF OF AMICUS CURIAE NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONER

SCOTT BURNS
NATIONAL DISTRICT
ATTORNEYS ASSOCIATION
ALBERT C. LOCHER
Counsel of Record
Assistant District Attorney
COUNTY OF
SACRAMENTO, CALIFORNIA
44 Canal Center Plaza,
Suite 110
Alexandria, VA 22314
Phone: (703) 549-9222
lochera@sacda.org
Attorneys for Amicus Curiae
National District
Attorneys Association

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the state may, consistent with the Fourth Amendment, take a buccal (cheek) swab for DNA testing without a warrant from a person who has been arrested for a felony offense, test the resulting sample, and enter the test results into a DNA database.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF INTEREST	1
FACTUAL AND PROCEDURAL BACKGROUND	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. TAKING OF AN ARREST DNA SAMPLE IS REASONABLE UNDER THE FOURTH AMENDMENT TOTALITY OF THE CIRCUMSTANCES TEST	4
II. DNA SAMPLING OF ARRESTEES IS DIRECTLY ANALOGOUS TO FINGERPRINTING, BOTH IN TERMS OF THE IMPOSITION ON THE PERSON, AND THE USE MADE OF THE SAMPLE TAKEN	7
A. The Physical Imposition on the Person for DNA Sampling is Not Greater Than for Fingerprinting	7
B. The Analysis and Database Use of Arrestee DNA Samples Are Directly Analogous to the Use Made of Booking Fingerprints	10
C. The Legal Reasoning Accepting Fingerprinting Applies to Arrest DNA Samples	13

TABLE OF CONTENTS – Continued

Page

III. RESPONDENT'S ARGUMENT THAT ARREST DNA SAMPLES ARE ONLY USED FOR INVESTIGATION PURPOSES DOES NOT PROVIDE A SOUND OR LASTING BASIS FOR A CONSTITUTIONAL RULE PROHIBITING ARRESTEE DNA 18

IV. THE STATE'S INTERESTS IN ARRESTEE DNA SAMPLING ARE SIGNIFICANT, OUTWEIGHING THOSE OF RESPONDENT 21

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Bell v. Wolfish, 441 U.S. 520 (1979) 5

Florence v. Board of Chosen Freeholders, 566 U.S. ___, 132 S.Ct. 1510 (2012) 6

Groceman v. United States Department of Justice, 354 F.3d 411 (5th Cir. 2004) 4

Haskell v. Harris, 669 F.3d 1049 (9th Cir. 2012), en banc rehearing granted, 686 F.3d 1121 (2012) 23

Johnson v. Quander, 440 F.3d 489 (D.C. Cir. 2006) 5

Jones v. Murray, 962 F.2d 302 (4th Cir. 1992) 4

King v. State, 425 Md. 550, 42 A.3d 549 (Md. 2012) ..... *passim*

Mario W. v. Kaipo, 637 Ariz. Adv. Rep. 22, 281 P.3d 476 (Ariz. 2012) 9, 19

Napolitano v. United States, 340 F.2d 313 (1st Cir. 1965) 13

Padgett v. Donald, 401 F.3d 1273 (11th Cir. 2005) 5

People v. Buza, 197 Cal.App.4th 1424, 129 Cal.Rptr.3d 753 (2011), hearing granted, 262 P.2d 854, 132 Cal.Rptr. 616 (2011) 16, 17, 25

People v. McInnis, 6 Cal.3d 821 (1972) 6

People v. Rankins, 265 N.W.2d 792 (Mich. App. 1978) 6

TABLE OF AUTHORITIES – Continued

Page

People v. Scott, 21 Cal.3d 284 (1978) 6

Rochin v. California, 342 U.S. 165 (1952) 6

Samson v. California 547 U.S. 843 (2006).....4

Schmidt v. City of Bella Villa, 557 F.3d 564 (8th Cir. 2009) 6

Shaffer v. United States, 24 D.C. App. 417 (1904).....22

Smith v. United States, 324 F.2d 879 (D.C. Cir. 1963) 13

State ex rel. Burns v. Clausmeier, 154 Ind. 599, 57 N.E. 541 (1900).....22

United States v. Edwards, 415 U.S. 800 (1974) 6

United States v. Iacullo, 226 F.2d 788 (7th Cir. 1955) 13

United States v. Karo, 468 U.S. 705 (1984) 14

United States v. Kelly, 55 F.2d 67 (2d Cir. 1932).....13

United States v. Kincade, 379 F.3d 813 (9th Cir. 2004) 15, 17

United States v. Knights, 534 U.S. 112 (2001).....4

United States v. Krakilo, 451 F.3d 922 (8th Cir. 2008) 5

United States v. Krapf, 285 F.2d 647 (3d Cir. 1961) 13

United States v. Kriesel, 508 F.3d 941 (9th Cir. 2007) 5

TABLE OF AUTHORITIES – Continued

Page

United States v. Mitchell, 652 F.3d 387 (3d Cir. 2011) (en banc) 19

United States v. Pool, 621 F.3d 1213 (9th Cir. 2010), vacated and appeal dismissed, 659 F.3d 761 (2011) 15

United States v. Robinson, 414 U.S. 218 (1973) 5

United States v. Salerno, 481 U.S. 739 (1987) 5, 19

United States v. Sczubelek, 402 F.3d 175 (3d Cir. 2005) 4

United States v. Weickert, 504 F.3d 1 (1st Cir. 2007) 4

United States v. Weir, 657 F.2d 1005 (8th Cir. 1981) 6

Ward v. State, 903 N.E.2d 946 (Ind. 2009) 6

Wilson v. Collins, 517 F.3d 421 (6th Cir. 2008) 4

Winston v. Lee, 470 U.S. 753 (1985) 6

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Fourth Amendment ..... *passim*

STATUTES

18 U.S.C. § 3142(g)(3)(A) 19

42 U.S.C. § 14132 ..... 10, 11

42 U.S.C. § 14135a 11

42 U.S.C. § 14135e 14

TABLE OF AUTHORITIES – Continued

Page

California Penal Code § 295.1 14

California Penal Code § 999.5(i) 14

Maryland Code Annotated, Public Safety § 2-505(b) 14

Maryland Code Annotated, Public Safety § 2-512(c) 14

RULES

California Rule of Court 8.1105(e) 17

OTHER AUTHORITIES

California Attorney General Press Release, "Brown Releases Study Showing DNA Collected at Arrests Helps Solve Murders, Rapes and Other Violent Crimes" (6/16/10) 23

California Department of Justice, "BFS DNA Frequently Asked Questions" 15

California Department of Justice, "Buccal DNA Collection Kit Instructions" 8

Denver District Attorney News Release, "Man Found Guilty in '04 Cold Homicide Case" 23

Epstein, "Genetic Surveillance – The Bogeyman Response to Familial DNA Investigations," 2009 U.Ill. J.L. Tech & Pol'y 141 (2009) 8

FBI, "High Resolution Buccal Collection Procedure Poster" 8

TABLE OF AUTHORITIES – Continued

Page

FBI website, "CODIS, NDIS Statistics" 11

FBI website, "CJIS, Fingerprints & Other Biometrics, IAFIS" 12

IntegenX website, "RapidHIT 200 Human DNA Identification System" 20

Kaye, "A Fourth Amendment Theory for Arrestee DNA and Other Biometric Databases," 15 U.Pa.J.Const.L. No. 4, p. ___ (2013), also published as Penn State Univ. Law School, Legal Studies Research Paper No. 7-2012 12

King, "Rapid DNA Quickly Becoming Reality," *Biometric Update.com* (5/23/12) 20

Messmer, "FBI Eager to Embrace Mobile 'Rapid DNA' Testing," *Network World* (9/18/12) 20

Moses, "Chapter 6, Automated Fingerprint Identification System (AFIS)," *The Fingerprint Sourcebook,* National Institute of Justice (2011) 12

NetBio website, "NetBio Rapid DNA Analysis Solutions" 20

Ohio Department of Rehabilitation and Correction, "DNA Sample, Instructions for Using Buccal Collection Kit" 8

Planet Biometrics, "BCC Opens in Tampa – FBI Keynotes," *Planet Biometrics* (9/18/12).....21

TABLE OF AUTHORITIES – Continued

Page

Preston, Note, "Faulty Foundations: How the False Analogy to Routine Fingerprinting Undermines the Argument for Arrestee DNA Sampling," 19 Wm. & Mary Bill Rts. J. 475 (2010) 17

RAND Corp., Center on Quality Policing, *Towards a Comparison of DNA Profiling and Databases in the United States and England* (2010) 24, 25

Sacramento Bee 911 Blog, "Man Convicted of 1989 Rape-Murder of Sacramento Woman" (9/27/10) 23

Steffen and Mitchell, "Suspect in 2004 Slaying in Colorado Arrested in California," *Denver Post* (8/3/11) 23

Texas Department of Public Safety, "Statewide CODIS DNA Database Program – Overview" 15

Washington State Patrol, "CODIS Laboratory" 15

ZyGEM Corp. Ltd. website, "Microlab Platform" 20

STATEMENT OF INTEREST

This brief is submitted by the National District Attorneys Association (NDAA), as amicus curiae in support of petitioner the state of Maryland.[1]

The NDAA is the largest and primary professional association of prosecuting attorneys in the United States. The association has approximately 7,000 members, including most of the nation's local prosecutors, assistant prosecutors, investigators, victim witness advocates, and paralegals. The mission of the association is, "To be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people." NDAA provides professional guidance and support to its members, serves as a resource and education center, produces publications, and follows and addresses public policy issues involving criminal justice and law enforcement.

This case raises matters of concern to prosecutors and law enforcement professionals nationwide. The issue before the Court concerns what biological or biometric samples may be taken from a subject arrested for a felony, and what investigative use may be made

---

[1] Pursuant to Supreme Court Rule 37.2(a), amicus states that all parties have consented in writing to the filing of this brief in letters on file with the Clerk of the Court. Pursuant to Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, and that no entity or person, other than amicus, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief.

of those samples. A decision by this Court will provide a uniform constitutional rule affecting whether arrested subjects can be identified through DNA samples taken at arrest, including their identification as perpetrators of other crimes, and whether subjects so identified may be brought to justice for other crimes, thereby being restrained from committing future crimes.

Amicus has expertise in the matters pending before the Court in this case, and believes that this brief will be helpful to this Court in its consideration of these matters.

FACTUAL AND PROCEDURAL BACKGROUND

In 2003, a stranger wearing a hat and a scarf over his face broke into the home of Vonette W. and raped her. She promptly reported the assault, and submitted to a rape exam. A semen sample from that exam was analyzed, producing a DNA profile of the rapist. The profile was entered into the Maryland state DNA database, at first without result.

In 2009, respondent Alonzo King was arrested on unrelated assault charges. Pursuant to Maryland law, a DNA sample was taken by means of a cheek, or buccal, swab. The analysis of that sample produced a DNA profile that was also entered into the Maryland DNA database, where it was found to match the sample from the rape of Vonette W. Charged with the crime, King moved to suppress the results of the

arrest DNA sampling. The motion was denied. King submitted his trial to a judge without a jury, on an agreed statement of facts, and was convicted.

On appeal, the Maryland Court of Appeals ruled that taking the arrest DNA sample from King without a warrant violated the Fourth Amendment, and reversed the rape conviction. *King v. State*, 425 Md. 550, 42 A.3d 549 (Md. 2012). That ruling is now before this Court on writ of certiorari.

SUMMARY OF ARGUMENT

Consistent with the rulings of this Court and the analysis of other courts that have examined the issue of DNA sampling, the Fourth Amendment analysis should follow the totality of the circumstances, balancing test. Under this test, the privacy interest of arrested subjects does not outweigh the governmental interest in taking basic records, measurements, and identifying information of arrested subjects, including a DNA sample. DNA sampling is directly analogous to fingerprinting at arrest booking, which courts have permitted. The physical imposition on the person is no greater, the uses to which the DNA sample is put are comparable to the uses made of arrest fingerprints, and the legal reasoning which has accepted arrest fingerprints is equally applicable to arrest DNA sampling. Respondent's argument that DNA samples are improperly used not for identification, but for investigation, is not a sound or lasting reason

to prohibit arrest DNA samples. The government's interests in arrest DNA sampling are weighty, outweighing the minor imposition on the arrested subject.

ARGUMENT

I. TAKING OF AN ARRESTEE DNA SAMPLE IS REASONABLE UNDER THE FOURTH AMENDMENT TOTALITY OF THE CIRCUMSTANCES TEST

This Court has stated that the legality of a search under the Fourth Amendment is measured by, "'examin[ing] the totality of the circumstances' to determin[e] whether a search is reasonable ... 'assessing on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Samson v. California*, 547 U.S. 843, 848 (2006); *United States v. Knights*, 534 U.S. 112, 118-119 (2001). The majority of courts that have considered issues relating to DNA sampling (whether taken from an arrestee, a convict, or a parolee) have concluded that the Fourth Amendment analysis should follow this totality of the circumstances, balancing test. See *United States v. Weickert*, 504 F.3d 1, 9-11 (1st Cir. 2007); *United States v. Sczubelek*, 402 F.3d 175, 184 (3d Cir. 2005); *Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992); *Groceman v. United States Department of Justice*, 354 F.3d 411, 413 (5th Cir. 2004); *Wilson v. Collins*, 517

F.3d 421, 427 (6th Cir. 2008); *United States v. Krakilo*, 451 F.3d 922, 924 (8th Cir. 2008); *United States v. Kriesel,* 508 F.3d 941, 946 (9th Cir. 2007); *Padgett v. Donald*, 401 F.3d 1273, 1278, n. 4 (11th Cir. 2005); *Johnson v. Quander*, 440 F.3d 489, 491, n. 1, (D.C. Cir. 2006).

The Maryland Court of Appeals in the instant case applied this balancing test, and concluded that the seizure and analysis of respondent's DNA sample was not reasonable. With all due respect to the majority justices on the Maryland court, this ruling does not properly balance the interests at issue, and should be reversed.

As a starting point for this analysis, one must note that an arrested subject, though not yet convicted, still has a reduced expectation of liberty and privacy. *Bell v. Wolfish*, 441 U.S. 520, 559-560 (1979); *United States v. Salerno*, 481 U.S. 739, 749 (1987). In view of that status, the practicalities relating to arrest and pre-conviction custody, and the reasonableness of various minimally intrusive procedures, courts have permitted a wide variety of routine measurements, observations, and minimal searches respecting persons who are lawfully booked as part of a custodial arrest. These procedures include being photographed, as well as the taking of other identifying measures such as the observation and recording of height, weight, hair color, eye color, and fingerprinting, and disrobing to disclose scars or tattoos. See, e.g., *United States v. Robinson*, 414 U.S. 218 (1973) (search of the person incident to custodial arrest);

United States v. Edwards, 415 U.S. 800 (1974) (same); *Florence v. Board of Chosen Freeholders*, 566 U.S. ___, 132 S.Ct. 1510 (2012) (strip search and extensive unclothed examination of arrested subject being admitted to general population of jail); *United States v. Weir*, 657 F.2d 1005 (8th Cir. 1981) (hair sample on arrest); *Ward v. State*, 903 N.E.2d 946 (Ind. 2009) (same); *People v. Rankins*, 265 N.W.2d 792 (Mich. App. 1978) (same); *People v. McInnis*, 6 Cal.3d 821, 825-826 (1972) (booking photo); *Schmidt v. City of Bella Villa*, 557 F.3d 564, 572-574 (8th Cir. 2009) (photograph of tattoo under clothing during booking); and fingerprinting (discussed in more detail below).

Certain types of bodily intrusions have been held to be so invasive and unreasonable that they are prohibited under the Constitution, even as to subjects arrested and in custody. See *Rochin v. California*, 342 U.S. 165 (1952) (forcible administration of an emetic by way of a stomach tube, to induce vomiting in order to recover narcotics evidence); *People v. Scott*, 21 Cal.3d 284 (1978) (forcible manipulation of the prostate by digital rectal means to obtain semen sample for STD testing); and *Winston v. Lee*, 470 U.S. 753 (1985) (surgical removal under general anesthetic of a bullet lodged in a robbery suspect's chest). Taking a DNA buccal swab does not even begin to approach the personal invasions of these intrusions.

When balanced against the diminished expectation of privacy accorded an arrested subject, and measured against the other impositions to which arrested persons are subject, the buccal swab procedure

is no more intrusive than other routine body checks, sampling and recording that courts have found reasonable.

II. DNA SAMPLING OF ARRESTEES IS DIRECTLY ANALOGOUS TO FINGERPRINTING, BOTH IN TERMS OF THE IMPOSITION ON THE PERSON, AND THE USE MADE OF THE SAMPLE TAKEN

Considering DNA sampling when compared to other procedures common for arrested subjects, the most direct and apt analogy is fingerprinting. The Maryland Court of Appeal majority considered and rejected the analogy between taking fingerprints and taking a DNA sample. *King*, supra, 425 Md. at 596, 42 A.3d at 577. The Maryland Court's conclusion is faulty for a number of reasons.

A. The Physical Imposition on the Person for DNA Sampling is Not Greater Than for Fingerprinting

The buccal swab process involves the collection of epithelial cells from the inner surface of the cheek. The cells are captured with a collection device, which may be a simple cotton swab, or a plastic device, similar in size and shape to a popsicle stick, which has one surface with specialized paper, fabric, or foam rubber. The collection device is rubbed several times against the inner surface of the cheek. It is no more intrusive and takes less time than brushing one's

teeth. Written instructions from three different agencies (California State Department of Justice, Ohio Department of Rehabilitation and Correction, and the FBI) describing the process can be found online:

> http://ag.ca.gov/bfs/pdf/collection_kit.pdf (California Department of Justice, Buccal DNA Collection Kit Instructions)[2]
>
> http://www.drc.ohio.gov/web/drc_policies/documents/52-RCP-05.pdf (Ohio Department of Rehabilitation and Correction, DNA Sample, Instructions for Using Buccal Collection Kit)
>
> http://www.fbi.gov/about-us/lab/dna-nuclear/image/high-resolution-buccal-collection-procedure-poster/view (FBI, High Resolution Buccal Collection Procedure Poster)

Two training videos demonstrating the taking of a buccal swab for a DNA sample (with the collection device in the mouth for less than 10 seconds) can be found online at:

> http://www.youtube.com/watch?v=tFQKYzQZ0yE&feature=related
>
> http://www.youtube.com/watch?v=R4FCz7pQexA&feature=related

Reviewing these materials, it is not surprising that buccal swab DNA sampling has been called "perhaps the least intrusive of all seizures." Epstein,

---

[2] This website citation, and all website citations following, were last viewed on December 26, 2012.

"Genetic Surveillance – The Bogeyman Response to Familial DNA Investigations," 2009 U.Ill. J.L. Tech & Pol'y 141, at 152 (2009). The Arizona Supreme Court, in *Mario W. v. Kaipo*, 637 Ariz. Adv. Rep. 22, 281 P.3d 476 (Ariz. 2012), while ultimately ruling that arrestee DNA samples could not be analyzed and uploaded into a database, conceded that, "The intrusion on an arrestee's privacy interests in the swiping of a swab to obtain buccal cells is not significantly greater than fingerprinting." 281 P.3d at 481.

By comparison, the traditional method of taking a fingerprint sample involves the examiner inking the tips of each of the subject's fingers, then holding each finger, one at a time, and rolling it across the surface of a white card, to leave an ink image of the finger ridge impressions. Videos showing how fingerprinting is done for ink prints can be viewed online at:

http://www.youtube.com/watch?v=d7N-4UNAzsw

http://www.youtube.com/watch?v=Yh8hXrPO0k4&feature=related

Modern technology adopted by some agencies allows the examiner to forego the use of ink when using an electronic device with a glass surface, from which the fingerprints are scanned electronically. Even this technology, however, requires the examiner to hold and manipulate the subject's hands and fingers in the same manner as the taking of inked prints:

http://www.youtube.com/watch?v=YX68sxEyjYc&feature=related

Even with the inkless, electronic scan method, the subject's hands and each finger are handled, controlled and manipulated by the officer taking the prints, for approximately one minute – more time than taking a buccal swab (as illustrated by the web-sites referenced above). Using ink to roll fingerprints onto a white fingerprint card, the process takes even longer.

Thus, simple observation of the two physical procedures demonstrates that taking a buccal swab represents no greater intrusion or imposition on the person than fingerprinting.

B. The Analysis and Database Use of Arrestee DNA Samples Are Directly Analogous to the Use Made of Booking Fingerprints

Just as the physical process for taking a DNA sample is no more intrusive than that for taking fingerprints, neither is the use of the sample that has been taken any different. Both booking fingerprints and DNA sample profiles are saved, entered into a national database, and then compared in that database both to confirm identity and against fingerprints or DNA samples from crimes where no perpetrator has been identified.

The DNA Identification Act of 1994 (42 U.S.C. § 14132) authorized the FBI to operate the Combined DNA Index System, or CODIS, accepting DNA profiles from federal, state and local laboratories meeting

certain qualifications. In its early stages, CODIS accepted only DNA profiles from convicted persons. A 2005 amendment to the federal law (P.L. 109-162, amending 42 U.S.C. § 14132, 14135a), allowed CODIS to accept DNA profiles from states which collect and analyze it at the time of arrest. Now, 27 states and the federal government have arrestee DNA sampling. As of November 2012, CODIS contained 10 million convicted offender DNA profiles, and over 1.3 million arrestee DNA profiles. See FBI website, CODIS, NDIS Statistics, http://www.fbi.gov/about-us/lab/codis/ndis-statistics.

CODIS also accepts DNA profiles from forensic samples (i.e., crime scene evidence, rape exam evidence, autopsy samples, etc.), with the purpose of attempting to identify perpetrators of unsolved crimes. As of November 2012, CODIS has over 461,900 forensic samples, which come from all 50 states, as well as Puerto Rico, the District of Columbia, and from federal sources. Id. Due to the nationwide nature of the system, a state or local agency will often rely on comparisons with the DNA profiles provided by agencies from all over the country. The CODIS system has produced over 195,600 hits, assisting in more than 187,700 investigations. Id.

Fingerprints taken at booking are used in the same fashion. The FBI operates the Integrated Automated Fingerprint Identification System, or IAFIS, which stores not only inked or electronically recorded fingerprints from known subjects, but also is used for the search and comparison of latent (i.e., crime scene)

fingerprints to the repository of known fingerprints. The FBI plainly states that part of the function of IAFIS is to "solve and prevent crime." See FBI website, CJIS, Fingerprints & Other Biometrics, IAFIS, available online at: http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis. Latent crime scene prints entered into IAFIS are subject to further analysis and pattern matching, via computer, just as CODIS does for DNA. See Kaye, "A Fourth Amendment Theory for Arrestee DNA and Other Biometric Databases," 15 U.Pa.J.Const.L., No. 4, p. __, at ___, (2013), also published as Penn State University Law School, Legal Studies Research Paper No. 7-2012, at p. 6. Hits of crime scene prints matching known subject prints in IAFIS are estimated to be approximately 50,000 per year. Id.; National Institute of Justice, *The Fingerprint Sourcebook,* (August 2011), Moses, Kenneth, "Chapter 6, Automated Fingerprint Identification System (AFIS)," page 6-11.

Thus, arrestee DNA profiles are used in databases the same way that fingerprints are – confirming the identity of those whose profile or fingerprints are already in the database, and being compared against forensic samples or crime scene latent prints to help identify perpetrators in unsolved crimes.

C. The Legal Reasoning Accepting Arrest Fingerprinting Applies to Arrest DNA Samples

While this Court has never directly ruled on the application of the Fourth Amendment to the routine taking of fingerprints on arrest, appellate authority has overwhelmingly accepted the practice when the person was the subject of a lawful arrest. See, e.g., *United States v. Kelly*, 55 F.2d 67 (2d Cir. 1932); *United States v. Iacullo*, 226 F.2d 788 (7th Cir. 1955); *United States v. Krapf*, 285 F.2d 647, 650-651 (3d Cir. 1961); *Smith v. United States*, 324 F.2d 879 (D.C. Cir. 1963); *Napolitano v. United States*, 340 F.2d 313 (1st Cir. 1965). In these cases, fingerprints taken after lawful arrest were used for investigative purposes, to compare to crime evidence latent fingerprints. The reasoning in the cases which accept the taking arrestee fingerprints as part of standard booking procedures, and the use of the prints for investigative purposes, applies equally to DNA samples taken at arrest.

The Court of Appeals attempted to distinguish DNA sampling from fingerprints in part based on the claim that while the DNA loci used for identification have no known purpose under current scientific knowledge, the DNA buccal swab "contains within it unarguably much more than a person's identity . . . [but also] a vast genetic treasure map. . . ." *King v. State*, supra, 425 Md. at 596, 45 A.3d at 577. But the DNA sample is not analyzed for this supposed treasure map, or in any manner that will uncover the treasure. Rather, forensic DNA analysis looks only at

specific genetic loci (genes) that have no known biological purpose. It is the profile derived from analysis of these genes that is entered into the CODIS database. The Maryland statute provides strict prohibitions against use of the arrestee's DNA for any purpose other than identification. Md. Code Ann., Pub. Safety §§ 2-505(b), 2-512(c). Other DNA collection statutes have comparable prohibitions. See, e.g., 42 U.S.C. § 14135e; California Penal Code §§ 295.1, 299.5(i).

The Maryland court majority acknowledged, but then discounted, these prohibitions. See 425 Md. at 596, 42 A.3d at 577. But the Court articulated no reason for indulging in the presumption that the statutes would be ignored. This unfounded speculation about hypothetical misuse of technology has no place in Fourth Amendment analysis. "It is the exploitation of technological advances that implicates the Fourth Amendment, not their mere existence." *United States v. Karo*, 468 U.S. 705, 712 (1984).

The Maryland court also failed to recognize a simple judicial solution to the use of DNA samples for purposes other than identification – prohibit other uses if they are improper, but do not prohibit the use of the DNA for identification. The overreaching and unnecessary solution proposed by respondent and the Court of Appeals majority is to prohibit the taking of the DNA altogether so that it cannot be used for any purpose, throwing out the baby with the bath water. This conclusion, grounded in the belief that law enforcement officials will disregard the authorizing

statutes, does not provide a principled distinction between the taking of fingerprints and the taking of DNA samples at arrest.

In a connected point, the Court of Appeals, and some other authorities, claim that the fact the state retains the buccal swab sample after the DNA profile has been developed is somehow evidence of suspicious or even nefarious intent on the part of authorities to make further, more in depth study of the sample, mining it for more "DNA secrets." See *King v. State*, supra, 425 Md. at 596, 42 A.3d at 577; *United States v. Pool*, 621 F.3d 1213, 1237 (9th Cir. 2009) (Schroeder, J., dissenting) (ruling vacated and appeal dismissed, 659 F.3d 761); *United States v. Kincade,* 379 F.3d 813 (9th Cir. 2004) (cert. den., 544 U.S. 924) (O'Scannlain, J., plurality opinion at 837, Reinhardt, J., dissenting at 850); see also Brief of Respondent in Opposition to Petition for Certiorari, p. 6.

This line of argument is based on an unwarranted suspicion or misapprehension of the reasons for retaining the sample. In fact, the swab sample is retained for quality control and confirmation purposes, in the event a hit is made. See Texas Department of Public Safety, "Statewide CODIS DNA Database Program – Overview," online at http://www.txdps.state.tx.us/CrimeLaboratory/CODIS/index.htm; Washington State Patrol, "CODIS Laboratory," online at http://www.wsp.wa.gov/forensics/docs/crimelab/codis_brochure.pdf; California Department of Justice, "BFS DNA Frequently Asked Questions," online at http://oag.ca.gov/bfs/prop69/faqs. This is evidence of sound

forensic practice, not some intent on the part of the state to invade the privacy of the individual beyond identification analysis.

The analogy between fingerprinting and DNA sampling is so obvious, it has even led some authorities, in their search for a reasoned distinction, to go as far as to question the Fourth Amendment basis for arrestee fingerprinting. In the case at bar, the Maryland Court of Appeals majority recognized the dissonance between allowing fingerprinting at booking, and disallowing DNA sampling at booking, when it noted that "neither [photographing or fingerprinting at booking] . . . has undergone definitive Fourth Amendment scrutiny . . . " and "we should not be so quick to heap additional exceptions onto a constitutional principle, without a clearer, judicially-proven foundation." 425 Md. at 596, 42 A.3d at 577.

In a similar vein, the California Court of Appeals in *People v. Buza*, 197 Cal.App.4th 1424 (2011), in ruling against arrestee DNA sampling, stated:

> The view of DNA testing as analogous to fingerprinting is also problematic because the practice of fingerprinting on arrest, though routine, has never been subjected to Fourth Amendment analysis under the tests that must be used to analyze the constitutionality of DNA sampling. By the time the totality of the circumstances test was announced, "fingerprinting had long been informally deemed 'routine.'" [citation omitted] "Because the great expansion in fingerprinting came before the

> modern era of Fourth Amendment jurisprudence . . . , it proceeded unchecked by any judicial balancing against the personal right to privacy." 197 Cal.App.4th at 1446.

The only authorities the *Buza* court cited for this analysis were a student law review note (Preston, Note, "Faulty Foundations: How the False Analogy to Routine Fingerprinting Undermines the Argument for Arrestee DNA Sampling," 19 Wm. & Mary Bill Rts. J. 475 (2010)), and a single dissenting opinion by a lone justice in *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004) (Kozinski, J., dissenting, at 874). With all due respect to the Note author, Judge Kozinski, and the *Buza* Court of Appeal, this is hardly the stuff from which constitutional principles are made. The California Supreme Court has granted a hearing of review in *Buza* (262 P.2d 854, 132 Cal.Rptr. 616), which under California Rule of Court 8.1105(e) effectively vacates and depublishes the Court of Appeal decision.

The attacks on the analogy between DNA sampling and fingerprinting are based on misunderstanding, speculation, or poor analysis. They are, in the whole, unconvincing. The fact that the Maryland court majority did not articulate a persuasive theoretical basis for prohibiting DNA arrestee sampling (and its use in a searchable database) that distinguishes the practice from taking fingerprints at booking is telling. It means that following the path taken by the Court of Appeals would logically lead to disallowing

the use of booking fingerprints, and even booking photographs, for investigation purposes.

III. RESPONDENT'S ARGUMENT THAT ARREST DNA SAMPLES ARE ONLY USED FOR INVESTIGATION PURPOSES DOES NOT PROVIDE A SOUND OR LASTING BASIS FOR A CONSTITUTIONAL RULE PROHIBITING ARRESTEE DNA

As noted above, one of the arguments made by respondent, and part of the rationale adopted by the Maryland Court of Appeals, relates to the notion that the arrestee DNA samples are being used not for identification, but rather for investigation. The basis for the argument is that DNA testing, because of its complexities, takes several days to complete. By the time a DNA profile is developed from the booking sample, the subject's identity will already have been confirmed through photographs, fingerprints, or other traditional forms of identification. See Brief of Respondent in Opposition to Petition for Certiorari, p. 18; *King v. State*, supra, 425 Md. at 584-586, 598-600, 42 A.3d at 569-571, 578-579. Aside from the fact (discussed above) that the investigative use of DNA samples is directly analogous to the investigative use of booking fingerprints, there are two reasons this argument should not provide a basis for the constitutional rule respondent proposes.

First, as noted by petitioner and other amici, this argument takes too narrow a view of identification. The concept of identification embraces more than just

the name, date of birth, and social security or driver's license number. It also includes what the person has done. *United States v. Mitchell,* 652 F.3d 387, 414 (3d Cir. 2011), cert. den., 12 S.Ct. 1741. A person arrested for grand theft will be more likely to appear in court in response to release on own recognizance, or bail, if that is the only crime in his background; less likely if he knows there is a previously undisclosed rape or murder in his background which may be discovered, especially if his conviction for grand theft will trigger the taking of a DNA sample. Police, prosecutors, and courts routinely and properly take a person's background into account when making decisions about bail and jail release, both with respect to whether the person will return to court, and also the danger he or she presents to the community. See, e.g., 18 U.S.C. § 3142(g)(3)(A); *United States v. Salerno,* 481 U.S. 739 (1987).

Second, this argument is premised on a view of DNA technology that will soon be obsolete. It is true that using the techniques and technology commonly employed in the forensic setting today (and for more than a decade), it takes several days or longer between the time the buccal swab first arrives at the DNA laboratory, and the time that a DNA profile, suitable for upload and comparison in a DNA database, has been developed. See *Mario W. v. Kaipo*, supra, 281 P.3d 476, at 483. But all that is about to change, due to new technology called Rapid DNA.

Rapid DNA combines nanotechnology, microchips, and new techniques, into a single machine, not

much larger than a desktop computer printer. These machines are designed to accept a DNA sample and perform all the steps in DNA profile analysis in approximately one to two hours. Messmer, "FBI Eager to Embrace Mobile 'Rapid DNA' Testing," *Network World* (9/18/12), published at http://www.networkworld.com/news/2012/091812-rapid-dna-262569.html?hpg1=bn.

This is not science fiction, nor a dramatic extension developed to satisfy the storyline for some prime time television drama. Three companies have produced and are beginning to market Rapid DNA machines: IntegenX, NetBio, Inc., and ZyGEM Corp., Ltd. See "RapidHIT 200 Human DNA Identification System," at http://integenx.com/products/rapid-dna/ (this webpage includes a marketing video showing not only the Rapid DNA machine, but also a suspect taking a buccal swab sample, and the swab being loaded directly into the machine); "NetBio Rapid DNA Analysis Solutions," at http://www.netbio.com/; "Microlab Platform," http://www.zygem.com/System/Microlab.html.

The intended market for Rapid DNA includes police agencies, with the vendors touting the machines for use in police agency booking areas. See King, "Rapid DNA Quickly Becoming Reality," *Biometric Update.com* (5/23/12), published at http://www.biometricupdate.com/201205/rapid-dna-quickly-becoming-reality/. The FBI has already acquired two of the machines for testing and validation, with the ultimate goal being the transmission of Rapid DNA results directly into CODIS. See Messmer, supra;

"BCC [Biometric Consortium Conference] Opens in Tampa – FBI Keynotes," *Planet Biometrics* (9/18/12), published at http://www.planetbiometrics.com/article-details/i/1255/; see also "Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System," Federal Bureau of Investigation website, at http://www.fbi.gov/about-us/lab/codis/codis-and-ndis-fact-sheet.

When such machines are deployed, they will allow a DNA buccal swab taken at the beginning of the booking process to be analyzed and uploaded into CODIS to confirm identity before booking is done. Thus, the suggestion by respondent and the Maryland Court of Appeals that DNA booking samples take too long to process for them to be used to confirm identification at the time of booking in the same manner as fingerprints should not be the rationale for a rule invalidating arrestee DNA sampling. A constitutional rule should not be grounded in presumptions about the supposed limits of real world practice that technology is already leaving behind.

IV. THE STATE'S INTERESTS IN ARRESTEE DNA SAMPLING ARE SIGNIFICANT, OUTWEIGHING THOSE OF RESPONDENT

While the imposition on the respondent is slight, the interest of the state in arrestee DNA sampling is weighty. The government has a substantial interest in the proper identification of those arrested, to ensure that the person arrested is indeed the person

who was sought; to ensure that it is the same person who later returns to court; to ensure, if the person escapes or flees, that the same person is brought back under the jurisdiction of the court; and to ensure that the subject's prior record is known, so that any punishment appropriately accounts for any recidivism, or lack thereof. To these ends, the courts have approved taking various records and biometric measurements of arrestees for over a century. *State ex rel. Burns v. Clausmeier*, 154 Ind. 599, 57 N.E. 541 (1900); *Shaffer v. United States*, 24 D.C. App. 417, 425-426 (1904). DNA sampling is simply the most recent and accurate method for meeting these important government purposes.

Also important is the government interest in solving crimes. The statistics cited above concerning the positive results of CODIS in crime investigations are numbers that represent real cases, with real offenders, and real victims. An example is People v. Billy Jene Wilson, Denver District Court No. 11 CR 20001. On August 21, 2004, the body of Gina Gruenwald was found in Denver, where she had been stabbed twice in the neck. No suspect was initially identified, but a DNA sample recovered from her body was analyzed for a profile, and entered into CODIS. In February 2011, Billy Jene Wilson was arrested for felony grand theft in San Francisco. Under California law, an arrestee DNA sample was taken, analyzed, and entered into CODIS. Wilson's DNA profile matched the DNA sample from Gina Gruenwald's body. He was arrested in San Francisco and extradited to Colorado,

where he was tried and convicted of felony murder, second degree murder, and attempted sexual assault. See Steffen and Mitchell, "Suspect in 2004 Slaying in Colorado Arrested in California," *Denver Post* (8/3/11); Denver District Attorney News Release, "Man Found Guilty in '04 Cold Homicide Case," available online at http://www.denverda.org/News_Release/Releases/2012%20Release/Wilson%20Conviction.pdf.

A similar case is People v. Donald Carter, Sacramento Superior Court No. 09F05363. In May 1989, 80-year-old Sophia McAllister was found murdered in her Sacramento home. A DNA sample from the crime was entered into CODIS, without immediate results. In 2009, Donald Carter was arrested on felony drug charges, and a DNA sample was taken. When entered into CODIS, Carter's DNA matched the forensic sample from the McAllister murder. The case proceeded to trial, and Carter was convicted of rape and murder. See *Haskell v. Harris*, 669 F.3d 1049 (9th Cir. 2012) (en banc rehearing granted, 686 F.3d 1121); *Sacramento Bee 911 Blog*, "Man Convicted of 1989 Rape-Murder of Sacramento Woman" (9/27/10); Attorney General Press Release, "Brown Releases Study Showing DNA Collected at Arrests Helps Solve Murders, Rapes and Other Violent Crimes" (6/16/10), published online at http://oag.ca.gov/news/press_release?id=1936.

Of course, also included among the cases solved by arrestee DNA samples, we find the respondent, a rapist caught when his DNA sample was taken after his unrelated arrest for another assault.

These are but a few of the cases where arrestee DNA sampling, and CODIS, have brought offenders to justice, brought closure to victims and their families, and protected the public by preventing future crimes.

Some have argued that adding more offender samples to a DNA database does not yield significant benefits. Proponents of this position cite a 2010 study by the RAND Corporation, Center on Quality Policing, which evaluated certain aspects of DNA databases. See RAND Corp., Center on Quality Policing, *Towards a Comparison of DNA Profiling and Databases in the United States and England* (2010). That study compared the DNA database in England with several DNA databases in the United States, considering (among various other points) which strategy would improve the number of "hit" (or match) outcomes – increasing the number of offenders in the database, or increasing the number of unknown forensic (i.e., crime scene) samples in the database. Looking to the California experience, where there was a large backlog of crime scene samples awaiting processing and entry into the database, the study opined (among other things) that "hit" outcome measures would be improved more by devoting resource to analyzing and uploading crime scene samples, as opposed to known offender samples. See RAND, *Towards a Comparison etc.*, supra, at p. 18. Some have cited this study for the proposition that entry into a DNA database of offender samples derived from arrests should not be a high priority, even injecting this

point into the constitutional analysis. See *People v. Buza*, supra, 197 Cal.App.4th at 1452-1453.

The experience of a single state (California) with a backlog should not be generalized to the status of DNA analysis in the entire country. In any event, read in context, the RAND study simply states the obvious truth that the more crime scenes are entered into a database, the more crime scenes can be linked to some offender. See RAND, *Towards a Comparison etc.*, supra, at pp. 17-20. This is a budget or allocation of resources argument – whether a finite amount of crime lab resource is better dedicated to analyzing offender samples, or analyzing crime scene samples. It is not a valid argument, of constitutional dimension, that taking arrestee samples is an unreasonable search. If it were, then as soon as California (or any other state) eliminated its backlog of crime scene DNA samples, the balance would swing in favor of the reasonableness of allowing arrestee DNA samples. Your amicus doubts that respondent, or others arguing against the taking of arrestee DNA samples, would agree that the Fourth Amendment measure of reasonableness can or should be tipped based on such workload trends, or budgeting decisions.

The important government purposes served by arrestee DNA sampling – proper identification of arrested subjects, and the investigation of serious crimes, bringing perpetrators to justice – outweigh the minor imposition of taking a buccal swab, and are consistent with over a century's jurisprudence

concerning information, samples and measurements taken at arrest.

CONCLUSION

Weighed in the balance against the slight intrusion involved in the simple taking of a cheek swab, this governmental interest is weighty and substantial. Like photography and fingerprinting before it, DNA sampling at arrest has taken its place as a brief and minor imposition on the arrested subject that provides significant benefits to society. With no more invasion of the person than is involved with brushing the teeth, identity is confirmed, and murderers, serial rapists and other criminals are brought to justice. The Maryland Court of Appeals, in ruling for respondent, erroneously balanced the constitutional interests at stake. Your amicus respectfully urges this Court to reverse.

DATED: December 28, 2012

Respectfully submitted,

ALBERT C. LOCHER
Counsel of Record
Attorney for Amicus Curiae
National District
Attorneys Association

AMICUS CURIAE BRIEF

No. 12-207

IN THE

Supreme Court of the United States

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
JAN 2 - 2013
OFFICE OF THE CLERK

STATE OF MARYLAND,
Petitioner,

v.

ALONZO J. KING, JR.
Respondent.

On Writ of Certiorari to the Maryland Court of Appeals

BRIEF OF THE NATIONAL GOVERNORS ASSOCIATION, THE NATIONAL CONFERENCE OF STATE LEGISLATURES, THE COUNCIL OF STATE GOVERNMENTS, THE NATIONAL ASSOCIATION OF COUNTIES, THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, THE UNITED STATES CONFERENCE OF MAYORS, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND THE NATIONAL SHERIFFS' ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

LISA E. SORONEN
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street NW
Suite 515
Washington, D.C. 20001
(202) 434-4845
lsoronen@sso.org

RICHARD WEINTRAUB
NATIONAL SHERIFFS' ASSOCIATION
1450 Duke Street
Alexandria, VA 22314
(800) 424-7827
rmwein1948@gmail.com

PRASHANT K. KHETAN*
MILIND PAREKH
TYLER S. MERTES
WILLIAM P. PIPAL
TROUTMAN SANDERS LLP
401 9th Street, N.W.
Suite 1000
Washington, D.C. 20004
(202) 274-2950
prashant.khetan@troutmansanders.com

* Counsel of Record

Library of Congress
Law Library

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
I. STATE DNA ARREST LAWS, AND STATE STATUTES MORE GENERALLY, ARE PRESUMED CONSTITUTIONAL	4
A. State Legislatures Are Responsible for Enacting Laws	4
B. This Court Should Defer to Maryland Legislature's Law because the Legislature is Tasked to Make Policy Decisions through Criminal Statutes that are Presumed Constitutional	6
II. STATES HAVE ADOPTED DNA ARREST LAWS BASED ON SOUND POLICY CONSIDERATIONS	9
A. DNA Arrest Laws Protect Citizens and Help Aid in Crime Prevention	9
1. The Maryland Study	11
2. The Chicago Study	12
3. The Washington State Study	12
4. The Denver Study	13
B. State DNA Arrest Laws Have Enjoyed Considerable Success	13

TABLE OF CONTENTS—Continued

Page

1. Success in Virginia 14

2. Success in Colorado and Denver 14

3. Success in North Carolina 14

C. State DNA Arrest Laws are Carefully Written to Weigh the Interests of the State Versus Arrestees of Serious Crimes 15

1. States Sample Arrestee DNA for Felony Offenses 15

2. State DNA Arrest Laws have Expungement Requirements 17

3. Many DNA Arrest Laws Contain Penalties for Misuse of DNA Information 19

4. State Labs That Process Arrestee DNA Samples Must Conform to Uniform Quality Control Standards Promulgated by the FBI 20

D. State DNA Arrest Laws Can Save State and Local Governments Money Which is a Boon to Those States and Local Governments Facing Law Enforcement Cutbacks 22

CONCLUSION 24

TABLE OF AUTHORITIES

CASES	Page(s)
Engle v. Isaac, 456 U.S. 107 (1982)	8
Evans v. Gore, 253 U.S. 245 (1920)	5
FCC v. Beach Commc'ns, Inc., 508 U.S. 307 (1993)	6, 7
Galloway v. State, 781 A.2d 851 (Md. 2001)	7
Gregg v. Georgia, 428 U.S. 153 (1976)	6, 7
Marbury v. Madison, 5 U.S. 137 (1803)	6
McDonald v. Bd. of Election Comm'rs, 394 U.S. 802 (1969)	7
Nordlinger v. Hahn, 505 U.S. 1 (1992)	7
Samson v. California, 547 U.S. 843 (2006)	5
Trop v. Dulles, 365 U.S. 86 (1958)	5
United States v. Knights, 534 U.S. 112 (2001)	5
United States v. Lopez, 514 U.S. 549 (1995)	8
United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166 (1980)	7
Vance v. Bradley, 440 U.S. 93 (1979)	7
CONSTITUTION	
U.S. Const. amend. IV	5
U.S. Const. amend. VIII	6
U.S. CONST. art. II	5
U.S. CONST. art. III	5

TABLE OF AUTHORITIES—Continued

Page(s)

U.S. CONST. art. IV 5

U.S. CONST. art. V 5

STATUTES

26 U.S.C. § 501(c)(4) 2

42 U.S.C.S. § 14132 21

42 U.S.C.S. § 14135a 20

730 ILL. COMP. STAT. 5/5-4-3 16

730 ILL. COMP. STAT. 5/5-4-3(a-3.2) 16

730 ILL. COMP. STAT. 5/5-4-3(f-1) 17

730 ILL. COMP. STAT. 5/5-4-3(f-5) 19

ALA. CODE § 36-18-24 15

ALA. CODE § 36-18-26 18

ALA. CODE § 36-18-28 19

ALASKA STAT. § 44.41.035 16

ALASKA STAT. § 44.41.035(i) 17

ARIZ. REV. STAT. ANN. § 13-610 16

ARIZ. REV. STAT. ANN. § 13-610(m) 18

ARK. CODE ANN. § 12-12-1006 16

ARK. CODE ANN. § 12-12-1105 16

ARK. CODE ANN. § 12-12-1113 18

ARK. CODE ANN. § 12-12-1115 19

CAL. PENAL CODE § 296 16

CAL. PENAL CODE § 299 18

TABLE OF AUTHORITIES—Continued

	Page(s)
CAL. PENAL CODE § 299.5(i)	19
CAL. PENAL CODE § 299.5(i)(1)(A)-(B)	19
CAL. PENAL CODE § 299.5(i)(2)(A)	19
COLO. REV. STAT. § 16-23-103	16
COLO. REV. STAT. § 16-23-103(b)	18
CONN. GEN. STAT. § 54-102k	19
CONN. GEN. STAT. § 54-102l	16
CONN. GEN. STAT. § 54-102l(a)	17
FLA. STAT. § 943.325	16
FLA. STAT. § 943.325(15)	19
FLA. STAT. § 943.325(16)(b)	18
KAN. STAT. ANN. § 21-2511	16
KAN. STAT. ANN. § 21-2511(e)(4)	18
LA. REV. STAT. ANN. § 15:609	16
LA. REV. STAT. ANN. § 15:614	18
LA. REV. STAT. ANN. § 15:618	19
MD. CODE ANN., CRIM. LAW § 14-101	15
MD. CODE ANN., PUB. SAFETY § 2-501	11, 16
MD. CODE ANN., PUB. SAFETY § 2-501(i)(2)	16
MD. CODE ANN., PUB. SAFETY § 2-504	5
MD. CODE ANN., PUB. SAFETY § 2-509(c)(2)	10
MD. CODE ANN., PUB. SAFETY § 2-511(a)(1)	17
MD. CODE ANN., PUB. SAFETY § 2-512	19

TABLE OF AUTHORITIES—Continued

Page(s)

MICH. COMP. LAWS § 28.176(11)(b) 18
MICH. COMP. LAWS § 750.520m 16
MINN. STAT. § 299C.105 16
MINN. STAT. § 299C.105(1)(a)(1) 16
MINN. STAT. § 299C.105(3) 17
MO. REV. STAT. § 650.055 16
MO. REV. STAT. § 650.055(5) 19
MO. REV. STAT. § 650.055(9) 18
N.J. STAT. ANN. § 53:1-20.18 16
N.J. STAT. ANN. § 53:1-20.25 18
N.J. STAT. ANN. § 53:1-20.26 19
N.M. STAT. ANN. § 29-3-10 16
N.M. STAT. ANN. § 29-16-10(A)(2) 18
N.C. GEN. STAT. § 15A-266.3A 16
N.C. GEN. STAT. § 15A-266.3A(h)(1) 17
N.D. CENT. CODE § 31-13-03 16
N.D. CENT. CODE § 31-13-07 18
N.D. CENT. CODE § 31-13-09 19
OHIO REV. CODE ANN. § 2901.07 ..... 16, 18
S.C. CODE ANN. § 23-3-620 16
S.C. CODE ANN. § 23-3-650 19
S.C. CODE ANN. § 23-3-660(A) 17
S.D. CODIFIED LAWS § 23-5A-5.2 16

TABLE OF AUTHORITIES—Continued

Page(s)

S.D. CODIFIED LAWS § 23-5A-26 19

S.D. CODIFIED LAWS § 23-5A-28 18

TENN. CODE ANN. § 40-35-321 16

TENN. CODE ANN. § 40-35-321(e)(1) 16

TENN. CODE ANN. § 40-35-321(e)(2) 17

TEX. GOV'T CODE ANN. § 411.153 19

TEX. GOV'T CODE ANN. § 411.1471 16

TEX. GOV'T CODE ANN. § 411.1471(e) 17

UTAH CODE ANN. § 53-10-403 16

UTAH CODE ANN. § 53-10-406(1)(i) 17-18

UTAH CODE ANN. § 53-10-406(12) 19-20

VA. CODE ANN. § 19.2-310.2:1 .....16, 17, 18

VA. CODE ANN. § 19.2-310.6 20

VT. STAT. ANN. tit. 20, § 1932 16

VT. STAT. ANN. tit. 20, § 1933(a)(2) 16-17

VT. STAT. ANN. tit. 20, § 1940(a) 18

VT. STAT. ANN. tit. 20, § 1941 20

OTHER AUTHORITIES

BUREAU OF JUSTICE STATS., U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf 10

TABLE OF AUTHORITIES—Continued

Page(s)

BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE: BY OFFENSE CHARGED, AGE GRP., AND STATE, (2010), *available at* http://www.albany.edu/sourcebook/pdf/t452010.pdf 9

BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE: CRIMINAL DEFENDANTS DISPOSED OF IN U.S. DISTRICT COURTS, BY OFFENSE AND TYPE OF DISPOSITION (2010), *available at* http://www.albany.edu/sourcebook/pdf/t5222010.pdf 8-9

CITY OF CHICAGO, CHICAGO'S STUDY ON PREVENTABLE CRIMES (2005), *available at* http://www.denverda.org/DNA_Documents/Arrestee_Database/Chicago%20Preventable%20Crimes-Final.pdf 12

CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, THE IMPACT OF THE ECONOMIC DOWNTURN ON AMERICAN POLICE AGENCIES (2011) 23

CODIS – NDIS Statistics, FEDERAL BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/lab/codis/ndis-statistics (last visited Dec. 12, 2012) 20-21

CODIS – NDIS Statistics, FEDERAL BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/lab/codis/codis_quality (last visited Dec. 12, 2012) 21

TABLE OF AUTHORITIES—Continued

Page(s)

DENVER DISTRICT ATTORNEY'S OFFICE, CITY OF DENVER, DENVER'S STUDY ON PREVENTABLE CRIMES, *available at* http://www.denverda.org/DNA_Documents/Arrestee_Database/Denver%20Preventable%20Crime%20Study1.pdf (last visited Dec. 20, 2012) 13

DENVER DISTRICT ATTORNEY'S OFFICE, CITY OF DENVER, UPDATE ON KATIE'S LAW, *available at* http://www.denverda.org/DNA_Documents/Arrestee_Database/Update%20on%20Colorado%27s%20Katie%27s%20law1%2011-19-12.pdf (last visited Dec. 20, 2012) 14

DNA Database Statistics, DEP'T OF FORENSIC SCIENCE, STATE OF VA., http://www.dfs.virginia.gov/statistics/index.cfm (last updated Oct. 31, 2012) 14

Erica Goode, *Crime Increases in Sacramento After Deep Cuts to Police Force*, N.Y. TIMES, Nov. 4, 2012, at A26 23

Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System, FEDERAL BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/lab/codis/codis-and-ndis-fact-sheet (last visited Dec. 12, 2012) 21-22

TABLE OF AUTHORITIES—Continued

Page(s)

James Staley, *Budget Cuts Mean Fewer Officers, Less Visibility for State Police*, LAS CRUCES SUN-NEWS (Nov. 28, 2012, 5:22 PM), http://www.lcsun-news.com/ci_22084586/budget-cuts-mean-fewer-officers-less-visibility-state 23

JAY SIEGEL & SUSAN D. NARVESON, WHY ARRESTEE DNA LEGISLATION CAN SAVE INDIANA TAXPAYERS OVER $50 MILLION PER YEAR (Jan. 2009), *available at* http://www.denverda.org/DNA_Documents/Arrestee_Database/Indiana%20Arrestee%20Legislation%20-%20Jan%2013%202009.pdf 10, 22

JOHN K. ROMAN ET AL., URBAN INSTITUTE, COST-EFFECTIVENESS ANALYSIS OF THE USE OF DNA IN THE INVESTIGATION OF HIGH-VOLUME CRIMES (Mar. 2008), http://www.urban.org/publications/411697. html 23

MD. CRIMINAL JUSTICE INFO. SYS., MARYLAND STUDY ON PREVENTABLE CRIMES, *available at* http://www.dnaresource.com/documents/MarylandDNAarresteestudy.pdf (last visited Dec. 11, 2012) 11, 12

Over 400 DNA Hits Helped Solve Cases in 2011, FORENSIC MAGAZINE (Apr. 23, 2012), http://www.forensicmag.com/news/over-400-dna-hits-helped-solve-cases-2011 15

TABLE OF AUTHORITIES—Continued

Page(s)

THE FEDERALIST NO. 78 (Alexander Hamilton)..... 5

WASH. STATE, WASHINGTON STATE PREVENTABLE CRIME, *available at* http://www.denverda.org/DNA_Documents/Arrestee_Database/WA%20Preventable%20Crime.pdf (last visited Dec. 20, 2012)..... 12-13

INTEREST OF THE *AMICI CURIAE* [1]

The National Governors Association (NGA), founded in 1908, is the collective voice of the Nation's governors. NGA's members are the governors of the 50 States, three Territories, and two Commonwealths.

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits *amicus* briefs to this Court in cases, like this one, that raise issues of vital state concern.

The Council of State Governments (CSG) is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's

---

[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk (Rule 37.2). This brief was not written in whole or in part by the parties' counsel, and no one other than the *amicus* made a monetary contribution to its preparation (Rule 37.6).

3,068 counties through advocacy, education, and research.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The U. S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The National Sheriffs' Association is a § 501(c)(4) non-profit formed in 1940, which promotes the fair and efficient administration of criminal justice throughout the United States; and, in particular, in advancing and protecting the Office of Sheriffs throughout the United States. The Association has over 21,000 members and is the advocate for over 3,000 sheriffs located throughout the United States. The National Sheriffs' Association promotes the public interest goals and policies of law enforcement in the nation, and it participates in judicial processes where the vital interests of law enforcement and its members are being affected. The

National Sheriffs' Association supports the continued use of DNA testing by local, state, and federal law enforcement authorities as a routine law enforcement practice in the twenty-first century. Today, DNA samples are commonly used as reliable evidence throughout our Nation's criminal justice systems to solve a full range of major crimes.

Amici represent state and local governments and governmental officials in urging this Court to reverse the decision of the Maryland Court of Appeals. These groups have a strong interest in this Court upholding statutes enacted by state legislatures. This is especially true for criminal law statutes since this area of the law is generally within the purview of state and local governments. *Amici* concur with the arguments made by Petitioner and the other *amici* supporting it. *Amici* will not repeat those arguments here. Rather, *amici* submit this brief to highlight that affirming the Maryland Court of Appeals' decision amounts to rejecting the policy interests of state legislatures and taking away from state and local officials the discretion they need to enact statutes that protect their citizens and provide for the efficient enforcement of criminal law within their jurisdiction.

SUMMARY OF THE ARGUMENT

A foundational principle of our democratic government is that legislatures are tasked with the duty of creating laws. Accordingly, statutes enacted by state legislatures are accorded deference by this Court and are presumed constitutional. This is especially true when the statute in question pertains to criminal law. Criminal law is almost exclusively within the province of state and local governments and, therefore, their policy decisions in this area should be accorded significant deference. State legislatures

that have enacted DNA arrest laws have recognized the efficacy and importance of these laws in aiding both crime prevention and crime detection. Accordingly, their policy decisions should not be second-guessed by the courts.

Moreover, states that have enacted DNA arrest laws have narrowly tailored these laws to balance the privacy interests of arrestees with the substantial benefit to state and local law enforcement that comes from collecting arrestee DNA. The statutes limit DNA sampling to arrests for felonies or other violent crimes. They also contain expungement provisions in instances where the arrestee is not subsequently convicted of an offense. Finally, they contain additional safeguards that are aimed at protecting the privacy of arrestees.

For all of these reasons, and those set forth in the briefs submitted by Petitioner and the other *amici* supporting it, this Court should reverse the judgment of the Maryland Court of Appeals.

ARGUMENT

I. STATE DNA ARREST LAWS, AND STATE STATUTES MORE GENERALLY, ARE PRESUMED CONSTITUTIONAL.

A. State Legislatures Are Responsible for Enacting Laws.

The authority to enact laws and, by necessity, make policy decisions, rests with state legislatures. For more than 200 years, the legislative branch of government has been recognized as having the authority to make policy decisions regarding the development of the law. Indeed, Alexander Hamilton, in considering the role of legislatures, once wrote that

"[t]he legislature . . . prescribes the rules by which the duties and rights of every citizen are to be regulated." THE FEDERALIST NO. 78 (Alexander Hamilton). The judiciary has the more limited role of applying the law in each case and reviewing legislative enactments to determine whether they are in accord with the Constitution. *See Trop v. Dulles*, 365 U.S. 86, 119-20 (1958) ("When the power of Congress to pass a statute is challenged, the function of this Court is to determine whether legislative action lies clearly outside the constitutional grant of power . . . ."). This separation between the power to make law and policy and the power to judge and interpret laws is a fundamental tenet of our democratic society. U.S. CONST. art. II-V; *Evans v. Gore*, 253 U.S. 245, 249 (1920) (discussing separation of powers).

These doctrines are applicable to the instant case as this Court is asked to review the constitutionality of Maryland's DNA Collection Act, MD. CODE ANN., PUB. SAFETY § 2-504 (LexisNexis 2012), which was duly enacted by Maryland's legislature (Maryland's DNA Collection Act).[2] Maryland's DNA Collection Act, and other statutes like it (collectively, DNA arrest laws) reflect a policy decision of the legislature and are entitled to deference by this Court based on longstanding precedent.

While the Fourth Amendment protection against unreasonable searches is an important right contained in the U.S. Constitution, its scope is not unlimited. *See, e.g., Samson v. California*, 547 U.S. 843 (2006); *United States v. Knights*, 534 U.S. 112 (2001) (state statutes allowing searches without sus-

---

[2] This law is very similar to a significant number of other state statutes. *See* discussion *infra* Part II.C.

picion of criminal activity upheld as constitutional). States have a significant role in defining criminal law, and DNA arrest laws are an appropriate exercise of that role.

B. This Court Should Defer to Maryland Legislature's Law because the Legislature is Tasked to Make Policy Decisions through Criminal Statutes that are Presumed Constitutional.

It is a well-settled principle of law that legislatures, not the judiciary, are tasked with the power to enact policy; this principle has been recognized by the federal judiciary since the seminal case of *Marbury v. Madison*. In that case, this Court recognized that "[i]t is emphatically the province and duty of the judicial department to say what the law is[,]" not what the law should be. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Accordingly, this Court has consistently acknowledged that the judiciary should refrain from judging "the wisdom, fairness, or logic of legislative choices." *See, e.g.*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993); *see also Gregg v. Georgia*, 428 U.S. 153, 174 (1976) (noting that the Court has a "limited role" in judging requirements of certain portions of the Bill of Rights). Of course, this Court is not merely a bystander, but as Justice Stewart eloquently noted while analyzing the parameters of the Eighth Amendment, "while [the Court] has an obligation to insure that constitutional bounds are not overreached, [the Court] may not act as judges as we might as legislators." *Gregg*, 428 U.S. at 174-75.

Instead, this Court has opined that "'[t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judi-

cial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.'" *Beach Commc'ns*, 508 U.S. at 314 (quoting *Vance v. Bradley*, 440 U.S. 93 (1979)). This Court has further emphasized the importance of leaving policy decisions to legislatures "where the legislature must necessarily engage in a process of line-drawing[,]" as the state of Maryland has done here. *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980). Accordingly, in reviewing statutes enacted by state legislatures, the judiciary must refrain from over-reaching and making decisions regarding public policy that are more appropriately left to the purview of state and local governments. In this case, Maryland, like 27 other states, has properly decided that enacting a DNA arrest law is in the best interests of public policy because of the effect the law can have on crime prevention and citizen safety.

Due to the deference accorded to state legislatures, this Court has frequently noted that state statutes are presumed constitutional. *See, e.g.*, *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 809 (1969); *see also Galloway v. State*, 781 A.2d 851, 857-58 (Md. 2001) ("In determining the constitutionality of statutes, the basic rule is that there is a presumption that the statute is valid.") (internal citations omitted). Additionally, this Court has provided that if it is possible, it will refrain from declaring a law unconstitutional. *See, e.g.*, *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). As such, a heavy burden rests on those who would attack the judgment of representatives of the people, as Respondent seeks to do here. *Gregg*, 428 U.S. at 176.

As legislative enactments by various state legislatures, DNA arrest laws should be presumed constitu-

tional. As this Court is aware, nearly 30 state legislatures have authorized the collection of DNA samples from those arrested for certain felony offenses.[3] Each state that has enacted these statutes has carefully considered their constitutionality and scope to tailor each statute in accordance with the requirements of the federal Constitution.[4] By necessity, the decision of where to draw the line with respect to DNA database laws is chosen by state legislatures. These types of policy decisions are properly left to those entrusted and chosen by the people to be their voice and conscience with respect to the creation of new laws.

Finally, because state and local governments play such a vital role in defining and enforcing criminal law, their decisions in this area in particular should be given significant deference. This Court has astutely noted that under our "federal system, the States possess primary authority for defining and enforcing the criminal law." *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (internal quotations and citations omitted); *Engle v. Isaac*, 456 U.S. 107, 128 (1982). Presumably, this principle is based on the fact that individual state and local governments shoulder most of the nation's burden in handling criminal cases.

This reality is evidenced by the sheer number of cases handled by the individual states in comparison to the federal government. In 2010, the federal government disposed of approximately 98,000 criminal cases. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE

---

[3] *See infra* Part II.C.1.

[4] *See infra* Part II.C.

STATISTICS ONLINE: CRIMINAL DEFENDANTS DISPOSED OF IN U.S. DISTRICT COURTS, BY OFFENSE AND TYPE OF DISPOSITION tbl. 5.24.2010 (2010), *available at* http://www.albany.edu/sourcebook/pdf/t5222010.pdf. By comparison, in 2010, Maryland alone disposed of approximately 250,000 criminal cases. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE: BY OFFENSE CHARGED, AGE GRP., AND STATE, 2010 tbl. 4.5.2010 (2010), *available at* http://www.albany.edu/sourcebook/pdf/t452010.pdf. More populous states like Florida and California each disposed of in excess of one million cases. *See id.* In fact, only 13 states disposed of less criminal cases than the federal government, and nearly all of these states have populations below one million. *See id.*

These statistics are indicative of state and local governments' important responsibility with respect to enforcing criminal law within their jurisdictions. Moreover, the large number of criminal cases handled each year by state and local governments necessitates that state legislatures enact criminal laws that promote resource efficiency. Thus, the decisions of state legislatures regarding how best to effectuate an efficient and orderly criminal justice system should be given considerable weight.

II. STATES HAVE ADOPTED DNA ARREST LAWS BASED ON SOUND POLICY CONSIDERATIONS.

A. DNA Arrest Laws Protect Citizens and Help Aid in Crime Prevention.

State legislatures, who have the responsibility for making policy judgments about how to best improve public safety, have concluded that taking the DNA

of arrestees can protect the innocent by catching suspects faster, pursuing prosecutions more expeditiously, and convicting criminals early in their criminal "careers." This conclusion is based not on conjecture, but data and studies conducted in both the states and at the local level.

As a number of reports and studies have shown, it is rare that an individual commits a violent felony like rape or murder as his or her first offense. Instead, the typical "career path" of a criminal evolves from smaller petty crimes to more serious crimes. *See* JAY SIEGEL & SUSAN D. NARVESON, WHY ARRESTEE DNA LEGISLATION CAN SAVE INDIANA TAXPAYERS OVER $50 MILLION PER YEAR (Jan. 2009), *available at* http://www.denverda.org/DNA_Documents/Arrestee_Database/Indiana%20Arrestee%20Legislation%20-%20Jan%2013%202009.pdf, and sources cited therein. Moreover, a study conducted in the 75 largest counties in the United States found that 64 percent of defendants had one or more felony arrests. BUREAU OF JUSTICE STATS., U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006 2 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf.

Maryland's DNA Collection Act is important not only to Maryland's law enforcement efforts, but to law enforcements efforts across the country as well. Currently, Maryland's DNA Collection Act permits the DNA that is taken from Maryland arrestees to be provided to any agency that participates in the Combined DNA Index System (CODIS), a federal database of all DNA profiles from participating states. MD. CODE ANN., PUB. SAFETY § 2-509(c)(2). This allows other states to access Maryland's DNA database information and determine if DNA collected

from crime scenes within their own borders matches any DNA from Maryland arrestees. Thus, obtaining DNA from arrestees in Maryland expands the national database, and enhances its ability to help solve and prevent crimes across the United States.

Any decision striking down the Maryland law as unconstitutional would potentially hamper law enforcement efforts nationwide and render the federal database less effective for other states and the federal government.

Several state and local government-sponsored studies focusing specifically on the public safety impact of DNA arrest laws have determined that if DNA testing of arrestees had been conducted earlier, it could have prevented later crimes. While most of these studies have looked at the impact of DNA collection at arrest as it relates to a few people—or even one person—it is striking how many violent crimes could have been prevented by DNA collection of a small number of people.

These studies illustrate that state legislatures did not pass DNA arrest laws in a vacuum. Instead, they relied on research that indicated adopting these laws would accomplish the sound public policy goals of deterring and solving crime.

1. The Maryland Study

A study conducted prior to the passage of Maryland's DNA Collection Act demonstrates the critical need for DNA arrest laws. The Maryland study was performed in support of the two bills that would eventually become Maryland Public Safety Code § 2-501. *See* MD. CRIMINAL JUSTICE INFO. SYS., MARYLAND STUDY ON PREVENTABLE CRIMES, *available at* http://www.dnaresource.com/documents/Maryland

DNAarresteestudy.pdf (last visited Dec. 11, 2012). The study examined the potential benefits of expanding DNA collection in Maryland to those arrested for violent crimes and burglaries. *Id.* The study analyzed the criminal histories of three offenders and concluded that if DNA samples had been taken upon their arrest, 20 crimes could have been prevented: eight rapes/sexual assaults, seven batteries/assaults, three robberies, two burglaries, and one murder. *Id.*

2. The Chicago Study

In 2005, the City of Chicago conducted a study of eight criminal recidivists over a 12 year period of time. CITY OF CHICAGO, CHICAGO'S STUDY ON PREVENTABLE CRIMES (2005), *available at* http://www.denverda.org/DNA_Documents/Arrestee_Database/Chicago%20Preventable%20Crimes-Final.pdf. The eight individuals were identified as being responsible for 60 violent crimes, including 53 murders and rapes. *Id.* at 1. The study noted that these 60 violent crimes "could have been prevented if DNA had been treated as the 'fingerprint of the 21st century.'" *Id.* In each case, the offender had committed unsolved violent crimes that could have been solved *immediately* through a DNA match. *Id.* One particular felon was responsible for *11* different murders that might have been prevented had his DNA been taken upon his initial arrest. *Id.*

3. The Washington State Study

The State of Washington published a study discussing the actions of a serial rapist, Anthony Casper Dias, who was able to go on a major crime spree before he was identified and arrested. WASH. STATE, WASHINGTON STATE PREVENTABLE CRIME,

available at http://www.denverda.org/DNA_Documents/Arrestee_Database/WA%20Preventable%20Crime.pdf (last visited Dec. 20, 2012). On July 31, 2005, Dias was arrested for felony hit-and-run. *Id.* At the time of his arrest, no DNA arrest law existed and no DNA was taken. *Id.* Subsequently, Dias posted bond and was released from custody pending trial. *Id.* One month later, Dias raped a 19 year-old woman in her bedroom. *Id.* DNA was collected from this rape, but the perpetrator could not be identified because there was no matching DNA in the DNA database. *Id.* at 1-2. Dias continued his crime spree that summer and raped a total of eight women and girls. *Id.* It was not until November 8, 2005, one day after raping two young girls, that Dias was finally arrested. *Id.* Had law enforcement been able to take Dias' DNA after the hit-and-run in July of 2005, it is very likely that nearly all of the subsequent rapes could have been prevented. *See id.*

4. The Denver Study

The Denver District Attorney's office conducted a study that closely analyzed five individuals' criminal history. DENVER DISTRICT ATTORNEY'S OFFICE, CITY OF DENVER, DENVER'S STUDY ON PREVENTABLE CRIMES, *available at* http://www.denverda.org/DNA_Documents/Arrestee_Database/Denver%20Preventable%20Crime%20Study1.pdf (last visited Dec. 20, 2012). The study concluded that had DNA been collected at arrest, 47 violent crimes could have been prevented, including three murders and 18 sexual assaults. *Id.*

B. State DNA Arrest Laws Have Enjoyed Considerable Success.

The numbers do not lie. While many DNA arrest laws are relatively new, state legislatures have not

been wrong in concluding that they would help solve and prevent crime. Across the country, state and local governments are experiencing the value of DNA arrest laws.

1. Success in Virginia

Virginia, which began arrestee DNA testing in 2003, shows how arrestee profiles can assist in solving and preventing crime. As of October 31, 2012, there were 356,112 DNA samples in Virginia's general DNA database, resulting in 8,344 hits. *See DNA Database Statistics*, DEP'T OF FORENSIC SCIENCE, STATE OF VA., http://www.dfs.virginia.gov/statistics/index.cfm (last updated Oct. 31, 2012). These hits have aided law enforcement efforts in 8,900 criminal investigations, including 1,126 sex crimes and 607 murders. *Id.* As of October 31, 2012, a total of 785 hits to the arrestee database had been obtained with 117 of those hits associated with sexual assault cases. *Id.*

2. Success in Colorado and Denver

The State of Colorado has had a DNA arrest law in place since October 1, 2010. DENVER DISTRICT ATTORNEY'S OFFICE, CITY OF DENVER, UPDATE ON KATIE'S LAW, *available at* http://www.denverda.org/DNA_Documents/Arrestee_Database/Update%20on%20Colorado%27s%20Katie%27s%20law1%2011-19-12.pdf (last visited Dec. 20, 2012). In total, 86,731 samples have been received, which has resulted in 398 hits to the CODIS database. *Id.* Of the 398 statewide hits, 131 hits were tied to Denver cases. *Id.*

3. Success in North Carolina

In the year after beginning to collect DNA from arrestees, North Carolina's crime lab obtained hits to

24 arrestee DNA profiles. *Over 400 DNA Hits Helped Solve Cases in 2011*, FORENSIC MAGAZINE (Apr. 23, 2012), http://www.forensicmag.com/news/over-400-dna-hits-helped-solve-cases-2011. As of April 2012, nine arrestee DNA hits had occurred during the calendar year. *Id.*

C. State DNA Arrest Laws are Carefully Written to Weigh the Interests of the State Versus Arrestees of Serious Crimes.

State legislatures have balanced competing policy interests of the state in solving and preventing crime with the privacy interests of arrestees when crafting DNA arrest laws. A review of state DNA arrest laws demonstrates that state legislatures have written them carefully to grant privacy protection to arrestees of serious crimes, while still providing law enforcement agencies with information that can assist them in solving crimes and maintaining public safety.

1. States Sample Arrestee DNA for Felony Offenses

Maryland's DNA Collection Act provides for the collection of DNA samples after charges are presented for burglary or a "crime of violence," which includes, among others, murder, rape, and sexual offense in the first degree. MD. CODE ANN., CRIM. LAW § 14-101 (LexisNexis 2012). All states' DNA arrest laws contain similar limitations on collection and provide for DNA sampling only where persons are arrested for felony offenses or worse. Thus, the statutes narrowly restrict collection of DNA samples to a limited class of arrestees accused of felonies or other violent crimes. ALA. CODE § 36-18-24 (2012);

ALASKA STAT. § 44.41.035 (2012); ARIZ. REV. STAT. ANN. § 13-610 (2012); ARK. CODE ANN. §§ 12-12-1006, 1105 (2012); CAL. PENAL CODE § 296 (West 2012); COLO. REV. STAT. § 16-23-103 (2012); CONN. GEN. STAT. § 54-102l (2012); FLA. STAT. § 943.325 (2012); 730 ILL. COMP. STAT. 5/5-4-3 (2012); KAN. STAT. ANN. § 21-2511 (2012); LA. REV. STAT. ANN. § 15:609 (2012); MD. CODE ANN., PUB. SAFETY § 2-501 (LexisNexis 2012); MICH. COMP. LAWS § 750.520m (2012); MINN. STAT. § 299C.105 (2012); MO. REV. STAT. § 650.055 (2012); N.J. STAT. ANN. § 53:1-20.18 (West 2012); N.M. STAT. ANN. § 29-3-10 (2012); N.C. GEN. STAT. § 15A-266.3A (2012); N.D. CENT. CODE § 31-13-03 (2012); OHIO REV. CODE ANN. § 2901.07 (LexisNexis 2012); S.C. CODE ANN. § 23-3-620 (2012); S.D. CODIFIED LAWS § 23-5A-5.2 (2012); TENN. CODE ANN. § 40-35-321 (2012); TEX. GOV'T CODE ANN. § 411.1471 (West 2012); UTAH CODE ANN. § 53-10-403 (LexisNexis 2012); VT. STAT. ANN. tit. 20, § 1932 (2012); VA. CODE ANN. § 19.2-310.2:1 (2012).

In addition to the probable cause requirement to arrest a person in the first instance, some DNA arrest laws contain an additional probable cause requirement. For example, Maryland's statute only allows for the sampling of arrestee DNA after an individual has been charged with a crime. MD. CODE ANN., PUB. SAFETY § 2-501(i)(2) (LexisNexis 2012). Similarly, Illinois' statute requires a grand jury indictment or a judicial finding of probable cause before sampling of arrestee DNA. 730 ILL. COMP. STAT. 5/5-4-3(a-3.2) (2012). The following code provisions contain similar probable cause requirements: MINN. STAT. § 299C.105(1)(a)(1) (2012); TENN. CODE ANN. § 40-35-321(e)(1) (2012); VT. STAT. ANN. tit. 20,

§ 1933(a)(2) (2012); VA. CODE ANN. § 19.2-310.2:1 (2012).

2. State DNA Arrest Laws have Expungement Requirements

Further restricting the use of DNA information collected from arrestees, many states' laws require automatic expungement of DNA samples collected where the arrestees are not later convicted of an offense. For example, under Texas's DNA arrest law, on acquittal of a defendant or dismissal of the case against a defendant, "the court shall order the law enforcement agency taking the specimen to immediately destroy the record of the collection of the specimen and require the department to destroy the specimen and the record of its receipt." TEX. GOV'T CODE ANN. § 411.1471(e) (West 2012). The following state laws contain automatic expungement requirements: ALASKA STAT. § 44.41.035(i) (2012); CONN. GEN. STAT. § 54-102l(a) (2012); 730 ILL. COMP. STAT. 5/5-4-3(f-1) (2012); MD. CODE ANN., PUB. SAFETY § 2-511(a)(1) (LexisNexis 2012) ("Except as provided in paragraph (2) of this subsection, any DNA samples and records generated as part of a criminal investigation or prosecution shall be destroyed or expunged automatically from the State DNA data base if: (i) a criminal action begun against the individual relating to the crime does not result in a conviction of the individual; (ii) the conviction is finally reversed or vacated and no new trial is permitted; or (iii) the individual is granted an unconditional pardon."); MINN. STAT. § 299C.105(3) (2012); N.C. GEN. STAT. § 15A-266.3A(h)(1) (2012); S.C. CODE ANN. § 23-3-660(A) (2012); TENN. CODE ANN. § 40-35-321(e)(2) (2012); TEX. GOV'T CODE ANN. § 411.1471(e) (West 2012); UTAH CODE ANN. § 53-10-406(1)(i) (LexisNexis

2012); VT. STAT. ANN. tit. 20, § 1940(a) (2012); VA. CODE ANN. § 19.2-310.2:1 (2012).

States where the DNA arrest laws do not provide for automatic expungement still permit for expungement upon request where the arrestee is never convicted of an offense.[5] For example, the Arizona DNA arrest law provides, in part, that an arrestee

> may petition the superior court in the county in which the arrest occurred or the criminal charge was filed to order that the person's deoxyribonucleic acid profile and sample be expunged from the Arizona deoxyribonucleic acid identification system . . . if . . . [t]he criminal charges are not filed within the applicable period . . . [or] [t]he criminal charges are dismissed.

ARIZ. REV. STAT. ANN. § 13-610(m) (2012); *see also* ALA. CODE § 36-18-26 (2012); ARK. CODE ANN. § 12-12-1113 (2012); CAL. PENAL CODE § 299 (West 2012); COLO. REV. STAT. § 16-23-103(b) (2012); FLA. STAT. § 943.325(16)(b) (2012); KAN. STAT. ANN. § 21-2511(e)(4) (2012); LA. REV. STAT. ANN. § 15:614 (2012); MICH. COMP. LAWS § 28.176(11)(b) (2012); MO. REV. STAT. § 650.055(9) (2012); N.J. STAT. ANN. § 53:1-20.25 (West 2012); N.M. STAT. ANN. § 29-16-10(A)(2) (2012); N.D. CENT. CODE § 31-13-07 (2012); S.D. CODIFIED LAWS § 23-5A-28 (2012).

---

[5] Ohio's DNA arrest law does not contain a provision for expungement; but, the state's general criminal laws do not contain any relevant restrictions on an individual's right to expungement. *See* OHIO REV. CODE ANN. § 2901.07 (LexisNexis 2012).

3. Many DNA Arrest Laws Contain Penalties for Misuse of DNA Information

In addition to the privacy protections flowing from limited sampling and expungement requirements, the DNA arrest laws also include significant penalties for misusing DNA information. Misuse of DNA information can include unauthorized disclosure, obtaining DNA information without proper authorization, or unauthorized testing of DNA samples. Under California's statute, misuse of DNA information can result in imprisonment of up to one year and a criminal fine, as well as civil damages up to $50,000 in certain instances. CAL. PENAL CODE § 299.5(i)(1)(A)-(B), § 299.5(i)(2)(A) (West 2012). The following state laws contain similar penalties regarding misuse of DNA information: ALA. CODE § 36-18-28 (2012); ARK. CODE ANN. § 12-12-1115 (2012); CAL. PENAL CODE § 299.5(i) (West 2012); CONN. GEN. STAT. § 54-102k (2012); FLA. STAT. § 943.325(15) (2012); 730 ILL. COMP. STAT. 5/5-4-3(f-5) (2012); LA. REV. STAT. ANN. § 15:618 (2012); MD. CODE ANN., PUB. SAFETY § 2-512 (LexisNexis 2012) ("A person who violates subsection (a) [disclosure to unauthorized persons], (b) [obtaining information without authorization], or (c) [unauthorized testing] of this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 5 years or a fine not exceeding $5,000 or both."); MO. REV. STAT. § 650.055(5) (2012); N.J. STAT. ANN. § 53:1-20.26 (West 2012); N.D. CENT. CODE § 31-13-09 (2012); S.C. CODE ANN. § 23-3-650 (2012); S.D. CODIFIED LAWS § 23-5A-26 (2012); TEX. GOV'T CODE ANN. § 411.153 (West 2012); UTAH CODE ANN. § 53-

10-406(12) (LexisNexis 2012); VT. STAT. ANN. tit. 20, § 1941 (2012); VA. CODE ANN. § 19.2-310.6 (2012).

4. State Labs That Process Arrestee DNA Samples Must Conform to Uniform Quality Control Standards Promulgated by the FBI

From state and local governments' perspective, one important advantage of states collecting DNA identification data is the ability to participate in and to use the national index systems. The DNA Fingerprint Act of 2005 enabled states to upload arrestee DNA profiles to CODIS and NDIS. *See* 42 U.S.C.S. § 14135a. CODIS is a computer software program that operates state, local, and national databases of DNA profiles from convicted offenders, arrestees, and others. CODIS software enables state, local, and national law enforcement crime laboratories to compare DNA profiles electronically, thereby linking serial crimes to each other and identifying suspects by matching DNA profiles from crime scenes with profiles from convicted offenders. NDIS is considered a part of CODIS and allows for states to upload DNA profiles into it.

The states' participation in providing DNA arrestee profiles to NDIS broadens considerably the scope of NDIS and allows state and local law enforcement access to data that would otherwise be unavailable to them, such as out of state data. As of October 2012, NDIS contained 1,279,400 arrestee profiles. CODIS's primary metric, the "Investigations Aided," tracks the number of criminal investigations where CODIS has added value to the investigative process. As of that same time, CODIS had produced over 193,100 hits assisting in more than 185,300 investigations. *CODIS – NDIS Statistics*, FEDERAL BUREAU OF

INVESTIGATION, http://www.fbi.gov/about-us/lab/codis/ndis-statistics (last visited Dec. 12, 2012).

Viewed from an arrestee's perspective, another federal law, the DNA Identification Act of 1994 (the DNA Act), protects an arrestee's privacy by requiring that the FBI Laboratory ensure that all DNA laboratories participating in NDIS demonstrate compliance with the standards issued by the FBI. *See* 42 U.S.C.S. § 14132; *see also CODIS – NDIS Statistics*, FEDERAL BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/lab/codis/codis_quality (last visited Dec. 12, 2012). Thus, states wishing to make use of NDIS must comport with standards ensuring that the DNA samples they collect are properly analyzed prior to uploading the information taken from those samples into NDIS.

Additionally, states participating in NDIS must sign a Memorandum of Understanding with the FBI Laboratory documenting their agreement to abide by the DNA Act requirements as well as record-keeping and other operational procedures governing the uploading of DNA data, expungements, CODIS users, and audits. Thus, state laboratories participating in NDIS are subject to stringent standards and ongoing quality evaluations.

Finally, concerns about the use of arrestee DNA information through NDIS are mitigated by virtue of the fact that NDIS only stores a DNA profile of arrestees. It is does not store actual DNA samples, names, or other personal identifiers of arrestees. Only limited information can be stored and searched on the national level. *See Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System*, FEDERAL BUREAU OF INVEST-

IGATION, http://www.fbi.gov/about-us/lab/codis/codis-and-ndis-fact-sheet (last visited Dec. 12, 2012).

D. State DNA Arrest Laws Can Save State and Local Governments Money Which is a Boon to Those States and Local Governments Facing Law Enforcement Cutbacks.

State DNA arrest laws can provide significant financial benefits to state and local governments who must cut costs because of budgetary constraints. In short, a more efficient and effective judicial system is an additional benefit of DNA arrest laws.

A study conducted in the State of Indiana concluded that implementing a DNA arrest law could save Indiana $50 million per year. In this study, the authors noted that for each reported crime in Indiana, taxpayers paid $1,836. JAY SIEGEL & SUSAN D. NARVESON, WHY ARRESTEE DNA LEGISLATION CAN SAVE INDIANA TAXPAYERS OVER $50 MILLION PER YEAR (JAN. 2009), *available at* http://www.denverda.org/DNA_Documents/Arrestee_Database/Indiana%20Arrestee%20Legislation%20-%20Jan%2013%202009.pdf. This figure took into account factors such as officer response, investigation, prosecution, and adjudication. *Id.* The authors concluded that the collection of DNA from arrestees produces cost savings because it reduces the number of crimes that must be processed by removing criminal recidivists from the streets. *Id.* at 5. Notably, the authors of the study described this estimate as "conservative" because it did not take into account potential savings that might be realized due to the more "efficient nature of DNA cases." *Id.* at 9. Likewise, a cost effectiveness study by the Urban Institute found that the average added cost for processing a

single case with DNA evidence was about $1,397. JOHN K. ROMAN ET AL., URBAN INSTITUTE, COST-EFFECTIVENESS ANALYSIS OF THE USE OF DNA IN THE INVESTIGATION OF HIGH-VOLUME CRIMES 5 (Mar. 2008), http://www.urban.org/publications/411697.html. According to that study, each additional arrest—an arrest that would not have occurred without DNA processing—cost $14,169. *See id.*

The fact that DNA arrest laws can save state and local governments considerable money is important because of recent budgetary cutbacks affecting law enforcement. Across the country, state and local governments are being forced to institute deep cuts to their police forces in the wake of budgetary concerns. *See, e.g.*, CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, THE IMPACT OF THE ECONOMIC DOWNTURN ON AMERICAN POLICE AGENCIES (2011); Erica Goode, *Crime Increases in Sacramento After Deep Cuts to Police Force*, N.Y. TIMES, Nov. 4, 2012, at A26; James Staley, *Budget Cuts Mean Fewer Officers, Less Visibility for State Police*, LAS CRUCES SUN-NEWS (Nov. 28, 2012, 5:22 PM), http://www.lcsun-news.com/ci_22084586/budget-cuts-mean-fewer-officers-less-visibility-state (New Mexico). As a result, laws that can both save state and local governments money *and* increase efficiency are imperative to the continued success of law enforcement efforts across the country.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Maryland Court of Appeals.

Respectfully submitted,

LISA E. SORONEN
STATE AND LOCAL
LEGAL CENTER
444 North Capitol Street NW
Suite 515
Washington, D.C. 20001
(202) 434-4845
lsoronen@sso.org

RICHARD WEINTRAUB
NATIONAL SHERIFFS'
ASSOCIATION
1450 Duke Street
Alexandria, VA 22314
(800) 424-7827
rmwein1948@gmail.com

PRASHANT K. KHETAN*
MILIND PAREKH
TYLER S. MERTES
WILLIAM P. PIPAL
TROUTMAN SANDERS LLP
401 9th Street, N.W.
Suite 1000
Washington, D.C. 20004
(202) 274-2950
prashant.khetan@
troutmansanders.com

* Counsel of Record

AMICUS CURIAE BRIEF

No. 12-207

IN THE

Supreme Court of the United States

MARYLAND,

Petitioner,

v.

ALONZO JAY KING, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF FOR GENETIC SCIENTISTS ROBERT NUSSBAUM AND SARA H. KATSANIS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

DANIELLE SPINELLI
Counsel of Record
ANNIE L. OWENS
WEILI J. SHAW
NICOLE RIES FOX*
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
danielle.spinelli@wilmerhale.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

STATEMENT 2

A. DNA Contains The Genetic Information Necessary For Reproducing Life 3

B. The FBI's Combined DNA Index System Allows Government Entities To Store And Share Individuals' DNA Profiles 6

1. The CODIS database 6

2. The 13 core CODIS markers 8

3. Matching STR profiles through CODIS 9

SUMMARY OF ARGUMENT 10

ARGUMENT 12

I. CODIS PROFILES REVEAL MORE THAN MERE IDENTITY AND COULD REVEAL EVEN MORE INFORMATION IN THE FUTURE 14

A. The 13 STR Loci Contain Information About Family Relationships That Authorities Can Access And Analyze Now 15

B. The 13 STR Loci May Contain Other Information About A Person's Traits And Characteristics 22

TABLE OF CONTENTS—Continued

Page

C. Advances In Technology May Lead To More Intrusive Profiling Technologies 28

II. A RETAINED DNA SAMPLE CAN REVEAL EVEN MORE INTIMATE DETAILS ABOUT THE INDIVIDUAL 30

CONCLUSION 34

TABLE OF AUTHORITIES

CASES

Page(s)

Kyllo v. *United States*, 533 U.S. 27 (2001) 11, 13

Nicholas v. *Goord*, 430 F.3d 652 (2d Cir. 2005) 25

United States v. *Jones*, 132 S. Ct. 945 (2012) 14

United States v. *Knights*, 534 U.S. 112 (2001) 12

STATUTES

42 U.S.C. § 14132 (2006) 6, 33

DNA Identification Act of 1994, Pub. L. No. 103-322, 108 Stat. 2065 ..... 6, 7

2008 Md. Laws ch. 337 20

Md. Pub. Safety Code

§ 2-505 ..... 30, 32

§ 2-506 19

§ 2-511 30

ADMINISTRATIVE AGENCY MATERIALS

73 Fed. Reg. 74,932 (Dec. 10, 2008) 22

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

Ad Hoc Committee on Partial Matches, Scientific Working Group on DNA Analysis Methods, *SWGDAM Recommendations to the FBI Director on the "Interim Plan for the Release of Information in the Event of a 'Partial Match' at NDIS,"* 11 Forensic Sci. Comms. (2009), *available at* http://www.fbi.gov/about-us/lab/forensic-science-communications/fsc/oct2009/standard_guidlines/swgdam.html 16

Albanèse, Véronique, et al., *Quantitative effects on gene silencing by allelic variation at a tetranucleotide microsatellite,* 10 Hum. Molecular Genetics 1785 (2001) 25

Axelrad, Seth, *Survey of State DNA Database Statutes* (2005), *available at* http://www.aslme.org/dna_04/grid/guide.pdf. 30

Berglund, Eva, et al., *Next-generation sequencing technologies,* 2 Investigative Genetics (2011) 28

Bidichandani, S.I., *The GAA Triplet-Repeat Expansion in Friedreich Ataxia,* 62 Am. J. Hum. Genetics 111 (1998) 26

Butler, John, *Advanced Topics in Forensic DNA Typing: Methodology* (2011) 9

Butler, John, *Forensic DNA Typing* (2d ed. 2005) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

Butler, John, *Genetics and Genomics of Core Short Tandem Repeat Loci Used in Human Identity Testing*, 51 J. Forensic Sci. 253 (2006) 8, 23, 24, 25

Chen, Rui, et al., *Personal Omics Profiling Reveals Dynamic Molecular and Medical Phenotypes*, 148 Cell 1293 (2012) 31

Collins, F.S., et al., International Human Genome Sequencing Consortium, *Finishing the euchromatic sequence of the human genome*, 431 Nature 931 (2004) 4

Davis, Carey & Bruce Budowle, *DNA Profiling of Database Reference Samples Using Second Generation Sequencing*, International Symposium on Human Identification (Oct. 17, 2012), *available at* http://www.promega.com/~/media/files/resources/conference%20proceedings/ishi%2023/oral%20presentations/12-davis.pdf?la=en 32

Federal Bureau of Investigation, *CODIS and NDIS Fact Sheet*, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet (last visited Feb. 1, 2013) 7, 8, 9, 10

Federal Bureau of Investigation, *CODIS—NDIS Statistics*, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/ndis-statistics(last visited Feb. 1, 2013). 8

TABLE OF AUTHORITIES—Continued

Page(s)

Federal Bureau of Investigation, *Planned Process and Timeline for Implementation of Additional CODIS Core Loci*, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/planned-process-and-timeline-for-implementation-of-additional-codis-core-loci (last visited Feb. 1, 2013) 29

Federal Bureau of Investigation, *The FBI and DNA* (2011), http://www.fbi.gov/news/stories/2011/november/dna_112311. 7

Greely, Henry T., et al., *Family Ties*, 34 J.L. Med. & Ethics 248 (2006) 15

Hindorff, Lucia, et al., *Potential Etiologic and Functional Implications of Genome-wide Association Loci*, 106 Procs. Nat'l Acad. Scis. 9362 (2009) 31

Jacewicz, R., et al., *Will genetic polymorphism of tetranucelotide sequences help in the diagnostics of major psychiatric disorders?*, 162 Forensic Sci. Int'l 24 (2006) 24, 25

Katsanis, Sara H. & Jennifer K. Wagner, *Characterization of the Standard and Recommended CODIS Markers*, 2012 J. Forensic Sci. 1 ..... 8, 23, 24, 25, 27

Kayser, Manfred & Peter Schneider, *DNA-based Prediction of Human Externally Visible Characteristics*, 3 Forensic Sci. Int'l: Genetics 154 (2009) 32

TABLE OF AUTHORITIES—Continued

Page(s)

Khoury, Muin, et al., *Fundamentals of Genetic Epidemiology* (1993) 27

Kim, Joyce, et al., *Policy implications for familial searching*, 2 Investigative Genetics (2011) 17, 18, 21, 22, 23

Koops, Bert-Jaap & Maurice Schellekens, *Forensic DNA Phenotyping*, 9 Colum. Sci. & Tech. L. Rev. 158 (2008) 32

Krebs, Jocelyn E., et al., *Lewin's Genes X* (10th ed. 2011) 4, 5, 27

Krimsky, Sheldon & Tania Simoncelli, *Genetic Justice* (2011) 16, 17

Murphy, Erin, *Relative Doubt: Familial Searches of DNA Databases*, 109 Mich. L. Rev. 291 (2010) 19, 20, 21, 22, 32

Pennisi, Elizabeth, *DNA Study Forces Rethink of What It Means to Be a Gene*, 316 Science 1556 (2007) 25

Presidential Commission for the Study of Bioethical Issues, *Privacy and Progress in Whole Genome Sequencing* (2012), *available at* http://www.bioethics.gov/cms/node/764 ..... 5, 28

Pulker, Hannah, et al., *Finding Genes That Underlie Physical Traits of Forensic Interest*, 1 Forensic Sci. Int'l: Genetics 100 (2007) 31

TABLE OF AUTHORITIES—Continued

Page(s)

Ram, Natalie, *Fortuity and Forensic Familial Identification*, 63 Stan. L. Rev. 751 (2011) 16, 17, 18, 19, 22

Ranum, Laura P.W. & Thomas A. Cooper, *RNA-Mediated Neuromuscular Disorders*, 29 Ann. Rev. Neuroscience 259 (2006) 26

Simoncelli, Tania, *Dangerous Excursions*, 34 J. L. Med. & Ethics 390 (2006) 30, 31

Wagner, Jennifer, Letter to the Editor, 2012 J. Forensic Sci. 1 25

Watson, James, et al., *Molecular Biology of the Gene* (6th ed. 2008) 4, 24, 26

Widom, Cathy Spatz & Linda M. Brzustowicz, *MAOA and the "Cycle of Violence,"* 60 Biological Psychiatry 684 (2006) 32

INTEREST OF AMICI CURIAE[1]

Amici curiae are scientists whose work focuses on genetics and the potential uses of genetic information in the law-enforcement and public-health arenas. Amici respectfully submit this brief to provide their perspective on the serious risks to privacy posed by DNA profiling of arrestees and the retention of DNA samples. Both profiles and samples can reveal intimate information about the person from whom they are taken, and the quantity and quality of such information will only increase as the technology and science of genetics continue to develop.

Robert Nussbaum, M.D., is a board-certified internist and medical geneticist specializing in the care of adults with hereditary disorders. He is Chief of Genomic Medicine at the University of California San Francisco Medical Center, Director of the Program in Cardiovascular Genetics at the UCSF Heart and Vascular Center, and Medical Director of the Hereditary Cancer Program at the UCSF Diller Family Cancer Center. Dr. Nussbaum is a member of the UCSF Institute for Human Genetics, where he studies the potential uses of genetic and genomic information to improve health care. Dr. Nussbaum was co-discoverer of the first inherited form of Parkinson's disease to be identified, continues to research the disease and potential treatments, and has been working to identify other inherited forms of the disease. Before joining UCSF, Dr. Nussbaum was chief of the Genetic Disease Research

---

[1] Letters consenting to the filing of this amicus brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person other than Amici or their counsel made a monetary contribution to the preparation or submission of this brief.

Branch of the National Human Genome Research Institute, one of the National Institutes of Health. He is also a member of the Institute of Medicine.

Sara H. Katsanis is an Associate in Research in the Institute for Genome Sciences & Policy at Duke University. She holds a Master of Science in Medical Genetics. Ms. Katsanis's research focuses on policy issues related to applications of genetic testing in medicine and law enforcement and how genetic technologies affect individuals. She has studied and published on direct-to-consumer genetic testing, pharmacogenetics drug labeling, familial searching of the FBI's Combined DNA Index System (CODIS), and surreptitious collection of DNA. Before joining Duke, Ms. Katsanis worked in Houston, Texas, as a DNA Analyst in the forensic laboratory at the Harris County Medical Examiner's Office and then as an Associate Scientist managing the genotyping facility at Lexicon Genetics, Inc. In 2002, she joined Johns Hopkins University as Laboratory Manager for the DNA Diagnostic Laboratory, responsible for overseeing and supervising clinical diagnostic testing. In 2006, Ms. Katsanis joined the Genetics & Public Policy Center at the Berman Institute of Bioethics at Johns Hopkins in Washington, D.C.

STATEMENT

DNA contains the basic instructions for creating every cell in a person's body. Other than identical twins, no two people possess precisely the same DNA. Although the connection between a person's DNA and his physical and behavioral attributes is complex and many factors play a role in the manner in which genetic information is expressed, a person's DNA plays a significant part in making that person who he is. A DNA sample contains a wealth of information about the per-

son from whom it is taken—information that may not be apparent from looking at the person and, indeed, may not be known to the person himself, including information about family relationships and susceptibility to disease. And while a DNA profile created for inclusion in a database reveals less information than a DNA sample, it nonetheless reveals otherwise unavailable information about that person's unique genetic makeup—and could reveal even more as genetic science and technology continue their rapid development.

A. DNA Contains The Genetic Information Necessary For Reproducing Life

To understand the science of DNA profiling, it is first necessary to understand the basic principles of genetics. A human being is made up of approximately 100 trillion cells, each of which contains the same genetic information. Butler, *Forensic DNA Typing* 17 (2d ed. 2005) (*DNA Typing*). Within the nucleus of each cell are molecules of deoxyribonucleic acid, or DNA. DNA contains the instructions—often referred to as a genetic "code" or "blueprint"—for replicating the cell and building the proteins and enzymes needed to sustain life. *Id.* The entire genetic code contained in a cell is known as its genome. *Id.*

In its normal form, DNA is double-stranded. Each strand comprises four "bases," represented by the letters A (adenine), T (thymine), C (cytosine), and G (guanine), linked together in a long chain. Butler, *DNA Typing* 18. Each base in a strand is joined by a chemical bond with a base on the other strand. As a result, the two strands are linked like the rails of a ladder, with the bonds between base pairs forming the rungs. The same bases always pair together: A always pairs with T, and C always pairs with G. *Id.* 18-19. The ge-

netic information contained in DNA manifests in the order or "sequence" of these base pairs. *See* Krebs et al., *Lewin's Genes X*, at 3 (10th ed. 2011).

DNA includes "coding" and "non-coding" regions. The coding regions, which are divided into functional units called "genes," contain information for making proteins, which are the building blocks of the human body. Butler, *DNA Typing* 22. Not all parts of genes are coding regions, however. The protein-coding portions of genes, known as "exons," are separated by intervening, non-coding portions known as "introns." *See* Watson et al., *Molecular Biology of the Gene* 141 (6th ed. 2008).[2] Other non-coding regions known as intergenic sequences lie not within genes, as with introns, but rather *between* them. *Id.* In fact, the vast majority of an individual's DNA consists of non-coding regions, including introns and intergenic sequences: The coding segments of the approximately 20,000 protein-coding genes in the human genome constitute less than 2% of genomic DNA. *See* Collins et al., International Human Genome Sequencing Consortium, *Finishing the euchromatic sequence of the human genome*, 431 Nature 931, 931, 942 (2004); Krebs 126. The markers used to create DNA profiles of individuals come from these non-coding regions.

Within the nucleus of most cells, DNA is organized into 23 pairs of chromosomes. One chromosome in each pair is inherited from the person's mother, and the other from the person's father. Butler, *DNA Typing* 20. The two chromosomes in a pair are known as "homologous" chromosomes because they are the same size and

---

[2] Genes also contain DNA segments, located at the start and end of the gene, that regulate how a cell translates the information contained within a gene into a protein. *See* Krebs 38, 81.

have the same genetic structure. However, because they are inherited from different parents, homologous chromosomes are not completely identical to each other. *Id.* 21, 23. Differences in the sequences of base pairs are valuable for DNA typing.

The location of a gene or a DNA marker on a chromosome is known as a "locus" (plural "loci"). Butler, *DNA Typing* 22-23. "Alleles" are variants of a gene or DNA sequence that occur at the same locus. Krebs 27. A person inherits two alleles for each locus, one from each parent; the two alleles may be the same or different. *Id.* Some alleles are rare in a population and some are common. Some alleles may be deleterious to gene function in ways that cause a defect or disease, while other alleles have no deleterious effects. Some allele variants (or combinations of variants) determine inherited characteristics, such as hair or eye color. *See* Presidential Commission for the Study of Bioethical Issues, *Privacy and Progress in Whole Genome Sequencing* 19 (2012), *available at* http://www.bioethics.gov/cms/node/764.

DNA profiling involves identifying the alleles found at multiple loci in an individual's DNA. Butler, *DNA Typing* 23. The most prevalent forensic profiling method, and the one at issue in this case, relies on stretches of DNA called "short tandem repeats" (STRs). STRs are repeating sequences of a few base pairs of DNA. *Id.* For example, an allele with the sequence of "TAGATAGATAGA" consists of three "repeats" of the "TAGA" sequence. Every individual has two copies of the STR at a particular locus (one on each chromosome in a pair), which may have the same or a different number of repeats. Certain STRs that are highly variable in the population will often (but not always) have different numbers of repeats in different individuals. *See*

Butler, *DNA Typing* 85. "STR typing" involves determining the number of "repeats" at specific STR loci in a DNA sample. For example, a person may have one allele with 6 repeats of the base sequence "TAGA" at a particular STR locus on one chromosome, and a different allele with 8 repeats at the same locus on the other, homologous chromosome. That individual would have a "genotype" of "6,8." Another person might have two copies of the 7-repeat allele at that locus, and would therefore have a genotype of "7,7."

A DNA profile specifies a person's genotypes at multiple STR loci. Examining enough loci will yield a profile that is statistically likely to be unique to that individual, given the frequency with which the relevant alleles occur at those loci in the population. Two different DNA samples can be "matched" by comparing genotypes at multiple STR loci. If the genotypes of two samples match at each locus, the samples are likely to have come from the same source. Butler, *DNA Typing* 7-10.

B. The FBI's Combined DNA Index System Allows Government Entities To Store And Share Individuals' DNA Profiles

1. The CODIS database

In 1994, Congress authorized the FBI to create an index of "(1) DNA identification records of persons convicted of crimes; (2) analyses of DNA samples recovered from crime scenes; and (3) analyses of DNA samples recovered from unidentified human remains." DNA Identification Act of 1994, Pub. L. No. 103-322, § 210304, 108 Stat. 2065, 2069 (codified as amended at 42 U.S.C. § 14132 (2006)). Using this authority, the FBI created the Combined DNA Index System (CODIS) to facilitate DNA data sharing and matching

across local, state, and national levels. FBI, *The FBI and DNA* (2011), http://www.fbi.gov/news/stories/2011/november/dna_112311. States and the federal government make DNA profiles available to other jurisdictions by uploading them into the National DNA Index System (NDIS), and they use the CODIS software to search profiles uploaded by other jurisdictions. FBI, *CODIS and NDIS Fact Sheet*, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet (last visited Feb. 1, 2013) (*CODIS Fact Sheet*). All fifty states, the District of Columbia, the federal government, and Puerto Rico participate in CODIS and use it to share profiles. *Id.*

CODIS organizes genetic profiles into three primary indices: (1) profiles of forensic evidence samples collected at crime scenes ("crime-scene" or "forensic" profiles), (2) profiles of known persons ("offender" profiles, which include convicted offenders, arrestees, and federal detainees), and (3) profiles of missing persons and unidentified remains. *See* Butler, *DNA Typing* 439-443; Pub. L. No. 103-322, § 210304(a), 108 Stat. at 2069; FBI, *CODIS Fact Sheet*. Profiles are added to the "forensic" index during criminal investigations of cases without a known suspect. Law-enforcement agents provide the forensic laboratory with evidence from a crime scene, such as DNA collected from a rape victim or on a suspected murder weapon. That DNA is used to create the profile of a "forensic unknown," which is compared to other forensic evidence to link unsolved cases, and to the offender index to identify potential suspects. *See* FBI, *The FBI and DNA*; Butler, *DNA Typing* 33-42.

Each jurisdiction determines for itself the categories of individuals whose DNA will be profiled for inclusion in the "offender" index. *See* Butler, *DNA Typing*

447-448. As of December 2012, the NDIS contained more than 10,086,400 offender profiles, 1,332,700 arrestee profiles, and 466,800 forensic profiles. FBI, *CODIS—NDIS Statistics*, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/ndis-statistics (last visited Feb. 1, 2013).

2. The 13 core CODIS markers

A complete CODIS DNA profile specifies the repeat lengths of 26 alleles at 13 core STR loci in the DNA sample. *See* FBI, *CODIS Fact Sheet*. The 13 core STR loci were selected because they are non-coding, are commonly found in a variety of repeat lengths in most population groups, and were not known at the time they were selected to be associated with particular traits or conditions. *See* Katsanis & Wagner, *Characterization of the Standard and Recommended CODIS Markers*, 2012 J. Forensic Sci. 1; Butler, *DNA Typing* 94-95; Butler, *Genetics and Genomics of Core Short Tandem Repeat Loci Used in Human Identity Testing*, 51 J. Forensic Sci. 253, 253-254 (2006) (*Genetics and Genomics*) (detailing history of STR marker selection).[3]

To create a CODIS profile from a DNA sample, biological material is collected from crime scene evidence or from an individual. DNA is then extracted from the sample and copied through the polymerase chain reaction (PCR) technique. Butler, *DNA Typing* 6-7, 63. PCR replicates targeted portions of DNA repeatedly to yield many copies of a particular sequence—a "molecu-

---

[3] In addition to the 13 core loci, a DNA profile often includes an "amelogenin" marker that differentiates between the X and Y chromosomes, and hence indicates sex. *See* Butler, *DNA Typing* 97-98, 113-115.

lar 'xeroxing' process." *Id.* 63. The PCR process makes it possible to detect particular DNA sequences that might have been present only a few times in the original sample. *Id.*

DNA analysts then use molecular techniques to detect the specific alleles present in the sample. By determining the lengths of the repeats at 13 separate loci, an analyst obtains 26 discrete measurements that help individuate one person from another. These 26 measurements compose the main part of the profile that is uploaded to CODIS. A CODIS profile also provides sufficient identifying information to trace the sample back to the uploading agency. Butler, *DNA Typing* 444; *see* FBI, *CODIS Fact Sheet.* The submitting jurisdiction retains the profiled individual's personal information. Butler, *DNA Typing* 444. Most jurisdictions also retain the DNA sample for some period of time. *See infra* p. 30.

3. Matching STR profiles through CODIS

Once a CODIS profile is created, it is compared to profiles in the other CODIS indices. A match between the forensic and offender indices of two or more DNA profiles is called a "hit." Butler, *DNA Typing* 439; *see* FBI, *CODIS Fact Sheet.* The CODIS software permits three levels of searches: high-, moderate-, and low-stringency. Butler, *Advanced Topics in Forensic DNA Typing: Methodology* 235 (2011). A high-stringency search generates a "hit" only if there is an exact match for all 26 alleles in the two profiles being compared, whereas moderate- and low-stringency searches generate "hits" even if there are some differences between the profiles. *Id.*

In the ordinary case, a DNA profile from evidence collected at a crime scene is uploaded into the CODIS "forensic" index and is compared with DNA profiles of known individuals stored in the "offender" index. *See* FBI, *CODIS Fact Sheet.* An investigator uses a high- or moderate-stringency search to look for a match between the alleles present in the crime-scene profile and the alleles at the same loci in the known offender profile. A high- or moderate-stringency match is considered evidence that the matching offender (or offenders, as moderate-stringency searches may return multiple matches) cannot be excluded from having been involved in the crime and may be used to establish probable cause to obtain an evidentiary DNA sample from the suspect. *Id.*

SUMMARY OF ARGUMENT

In the practice challenged in this case, Maryland law enforcement takes DNA samples from persons who have been arrested but not yet convicted of any crime and creates DNA profiles to facilitate the investigation of other crimes for which reasonable suspicion is lacking. Such DNA profiling of arrestees poses serious risks to privacy, and those risks will only worsen as genetic science advances. To be sure, a DNA profile does not contain a person's complete genome. Rather, as explained above, it specifies the lengths of 26 STRs at 13 loci in non-coding portions of DNA. It does not follow, however, that the privacy intrusion created by DNA profiling of arrestees is "minimal," as the State (at 13) and the United States (at 14) would have it.

To the contrary, both the DNA profiles maintained in the CODIS database and the underlying DNA samples contain otherwise private information that now is accessible to law enforcement. Moreover, as technolo-

gy and scientific understanding progress, DNA profiling will become increasingly intrusive. This Court has often recognized that the privacy risks posed by developing technology are relevant considerations in a Fourth Amendment analysis, *see, e.g.*, *Kyllo* v. *United States*, 533 U.S. 27, 34 (2001), and that is particularly true here, where evolving technology will allow the government to extract increasing amounts of personal information from DNA samples and profiles already in its possession.

First, even though a DNA profile does not contain all of a person's genetic data, it can reveal important information regarding family relationships. Unlike other biometrics such as fingerprinting, a DNA profile can be used to predict the relatedness of two individuals. Indeed, many states already search CODIS for "partial matches" between arrestees' profiles and crime-scene profiles that might suggest that an arrestee's *relative* was involved in a crime. Such "familial searching" is a significant privacy intrusion because it can disclose family relationships, such as paternity, that individuals may wish to keep secret or of which they are not even aware.

Beyond family relationships, the alleles at the 13 CODIS loci used for profiles may contain other information about a person's traits and characteristics because certain alleles at those loci are associated with a particular trait or characteristic. Moreover, advances in profiling techniques—ranging from a planned expansion in the number of CODIS markers to the feasibility of sequencing individuals' entire genomes—will increase the amount of genetic information contained within DNA profiles. With increasing amounts of genetic data obtained for genetic profiling, there is a heightened risk that future developments in genetic

science will allow sensitive personal information to be determined from DNA profiles.

Second, the retention of the entire DNA sample from which a CODIS profile is determined poses a separate, serious privacy risk. DNA samples, which comprise an individual's entire genetic code, can reveal an enormous amount of private, personal information. In that regard, DNA samples simply are not comparable to other commonly used identification techniques, such as fingerprinting. DNA samples already provide access to a vast array of information about a person, including whether that person has or is predisposed to a disease, his physical attributes, and his ancestry. And as science progresses, DNA samples may reveal to the government yet more personal and sensitive information—such as a person's propensity toward violence or depression—invading core privacy interests.

ARGUMENT

In analyzing whether Maryland's practice of DNA collection and profiling violates the Fourth Amendment, Petitioner and the United States call for a balancing test that weighs, "'on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'"[4] U.S. Br. 11 (quoting *United States* v. *Knights*, 534 U.S. 112, 119 (2001)) (alteration in original); Pet. Br. 11 (similar). Whatever the merits of such a "balancing" approach, Petitioner (at 13) and the United States (at 14) are wrong to characterize the privacy interests at stake as "minimal." One cannot conclude from existing

---

[4] Neither Amici nor Respondent (at 38-44) endorse such an approach.

research that a DNA profile—much less a retained DNA sample—is merely "equivalent to a fingerprint" and that it "reveals nothing private about the arrestee at all." U.S. Br. 19.

In fact, DNA profiles can reveal private information about individuals, including information about their family relationships and potentially, as the science develops, information about their biological traits. And a DNA sample provides access to the trove of private information contained in an individual's genome. If the Fourth Amendment status of DNA collection and profiling is to turn on a "balancing" analysis, that analysis should take full account of the privacy risks associated with the routine sampling and profiling of DNA of persons presumed to be innocent.

That analysis should also take into account the privacy risks likely to emerge in the future as science and technology evolve. The power of advances in science and technology "to shrink the realm of guaranteed privacy" has played a significant role in this Court's Fourth Amendment jurisprudence. *Kyllo* v. *United States*, 533 U.S. 27, 34 (2001). For example, although the thermal imaging technology at issue in *Kyllo* "was relatively crude," in that it disclosed little beyond the relative warmth of various areas of a residence, *id.* at 36, this Court noted that technologies with far greater power to reveal intimate details of the home were on the horizon, *see id.* at 37 n.3 ("The ability to 'see' through walls and other opaque barriers is a clear, and scientifically feasible, goal of law enforcement research and development."). The Court therefore explained that it had to "take the long view": "[T]he rule we adopt must take account of more sophisticated systems" that could emerge in the future. *Id.* at 36, 40.

That principle applies with even greater force here. Unlike the technology at issue in *Kyllo*, future advances in understanding and analyzing DNA can disclose new and intimate details about individuals from *existing* DNA profiles and samples, without any need to collect additional evidence from those individuals. Because DNA samples and profiles collected from individuals today may, with the steady march of science, disclose ever more information about those individuals in the future, these privacy risks must be taken into account in the Fourth Amendment analysis as well. *Cf. United States* v. *Jones*, 132 S. Ct. 945, 955-956 (2012) (Sotomayor, J., concurring) (noting privacy risk posed by GPS records tracking an individual's movements, which "[t]he Government can store ... and efficiently mine ... for information years into the future").

I. CODIS Profiles Reveal More Than Mere Identity And Could Reveal Even More Information In The Future

Creating DNA profiles for arrestees poses significant privacy risks. The 13 STR loci used in CODIS profiles contain a wealth of information about familial relationships that authorities have already begun using. Moreover, genetic science suggests that DNA profiles may contain information bearing on individuals' physical and medical traits, including their susceptibility to various medical conditions—information that may become apparent as science develops. The evolving state of genetic science, and the potential future uses to which DNA profiles could be put, create a significant risk that DNA profiling will reveal even more sensitive personal information in the future.

A. The 13 STR Loci Contain Information About Family Relationships That Authorities Can Access And Analyze Now

CODIS profiles differ from other means of identification, like fingerprints, in that they can reveal information regarding a person's intimate family relationships. Law-enforcement agencies have already begun using this information in criminal investigations, creating significant privacy risks for the subjects of DNA profiles.

1. Every person inherits one allele at each of the 13 CODIS loci from each of his biological parents; this biological inheritance gives rise to the 26 STRs included in the CODIS profile. Every person therefore shares at least 13 alleles with each of his parents. The actual number may be higher if both parents possess the same allele at one or more loci, in which case the child may end up sharing two alleles at a locus with a parent.[5] According to one estimate, a parent and child share on average 15.7 alleles out of the 26 profiled in CODIS. Full siblings are also likely to share alleles—16.7, on average—as a result of common inheritance from their parents. By contrast, unrelated individuals share an average of about 9 alleles. *See* Greely et al., *Family Ties*, 34 J.L. Med. & Ethics 248, 252-253 (2006).

This genetic similarity between family members enables law-enforcement agencies to identify possible family relationships through "partial matches" in CODIS. "A 'partial' match in this context refers to two

---

[5] For example, the father may have an 8-repeat and a 10-repeat, and pass the 8-repeat to the child. If the mother also has a 10-repeat and passes it to the child, the child will share both the 8-repeat and the 10-repeat with the father.

genetic profiles—one derived from a crime scene sample and the other from CODIS—that share some, but not all, of the 13 core DNA loci that comprise a CODIS profile." Ram, *Fortuity and Forensic Familial Identification*, 63 Stan. L. Rev. 751, 763 (2011).

CODIS can produce partial matches through either a moderate- or a low-stringency search. A moderate-stringency search returns a match if, at each locus, all of the alleles in one sample are present in the other, even if the reverse is not true. Thus, for example, a moderate-stringency search would match a profile showing a 7,7 genotype with one showing a 7,10 genotype. The two profiles would be considered a moderate-stringency match because the only allele present in the first profile (a 7-repeat) is also present in the second profile (which contains both the 7-repeat and the 10-repeat alleles). Such a match would be a "partial match," however, because the 10-repeat in the second profile is not present in the first.[6] Such "moderate stringency" searches are the default mode of matching "forensic unknown" profiles from evidence samples to known profiles in CODIS, because they avoid false negatives when the DNA typing process fails to detect an allele that is actually present in a source's DNA.[7]

---

[6] *See* Ad Hoc Committee on Partial Matches, Scientific Working Group on DNA Analysis Methods, *SWGDAM Recommendations to the FBI Director on the "Interim Plan for the Release of Information in the Event of a 'Partial Match' at NDIS,"* 11 Forensic Sci. Comms. (2009), *available at* http://www.fbi.gov/about-us/lab/forensic-science-communications/fsc/oct2009/standard_guidlines/swgdam.html; Krimsky & Simoncelli, *Genetic Justice* 65 (2011).

[7] Such failures can result where DNA is partially degraded, the sample contains DNA from multiple sources, or the profiling process fails to properly amplify and detect an allele. Krimsky & Simoncelli 68.

By contrast, a low-stringency match is one in which two samples share a majority of the 26 potential alleles at the 13 loci, allowing for some mismatch at some loci. Kim et al., *Policy implications for familial searching*, 2 Investigative Genetics, at 1 (2011). Thus, for example, a profile with the genotype 7,10 at one locus will match one with the genotype 3,7 at that locus, because both profiles contain the 7-repeat allele. Again, the match would be a partial one, because the 10-repeat allele in the first profile is not present in the second, and the 3-repeat allele in the second profile is not present in the first. Krimsky & Simoncelli, *Genetic Justice* 65 (2011). Low-stringency searches can be useful when investigators have "an evidence sample developed from multiple sources or if the DNA evidence is of low quality." Kim 1.

2. A partial match may identify a biological *relative* of the profiled person as the source of the crime-scene sample, because such relatives, "like the crime scene sample, share some but not all of the examined loci with the individual whose CODIS profile provided the partial match." Ram 764.[8] For this reason, some states search the CODIS "offender" index with the express purpose of locating partial matches—a practice sometimes known as "familial searching." Kim 2; Ram 766-783. California, Colorado, Nebraska, Texas, and Virginia all permit investigators, under certain circumstances, to search deliberately for partial matches with the objective of discovering relatives of the source of a forensic profile. *See* Ram 751 n.*, 771. Indeed, Califor-

---

[8] Partial matches may also occur for other reasons. The two profiles may come from the same person, in which case any differences between the profiles are likely due to DNA degradation, mixture of DNA from multiple sources, or failures in the profiling process. *See supra* n.7. Partial matches may also arise by pure chance due to natural variation in the population.

nia and Colorado have developed new DNA searching software specifically to facilitate familial searching. *Id.* 764. Several other states also allow familial searching, but lack published policies on the issue. *Id.* 771.

In states that permit the practice, familial searching is used to develop a suspect pool when conventional investigative tools have failed to produce leads. Kim 4, 5. Depending on the search's stringency and the frequency of the relevant alleles in the broader population, a familial search can result in anywhere from a few hits to hundreds or more. *Id.* 3. Many of these individuals will likely be false positives—random, unrelated persons that by chance share a similar DNA profile. If the number of results is large, investigators may use additional analysis, including additional profiling of retained DNA samples, to narrow the list.[9] The end result is a list of individuals who may have a *relative* that is the source of the evidence sample. Police can then use conventional investigative techniques to identify those relatives and determine whether any of them is the actual source of the sample. This type of searching "by design opens the investigation of potentially innocent individuals based on their genetic material." *Id.* 4.[10]

---

[9] For example, investigators may profile additional STR markers on the Y chromosome, which is inherited directly from father to son, to determine paternal relatedness between two samples. *Id.*

[10] The Amicus Brief of Genetics, Genomics and Forensic Science Researchers (Researchers' Brief) suggests (at 34-35) that CODIS profiles are not useful for familial searching because such searches produce a high rate of false positives. Indeed, false positives are very common in familial searching. Nonetheless, the push by several law-enforcement agencies to adopt familial searching, and the successes they have claimed as a result of that practice, indicate that these agencies believe in the utility of familial

Maryland and the District of Columbia statutorily prohibit searches of their DNA databases for the deliberate purpose of identifying a suspect's relatives, and several other states prohibit such intentional searches as a matter of internal laboratory policy. *See* Md. Pub. Safety Code § 2-506(d); Ram 771. Many of these states nonetheless permit the disclosure to investigators of partial matches that are discovered "fortuitously," after a routine moderate- or low-stringency database search. Ram 769. Thus, for example, a laboratory may conduct a moderate-stringency search (the default type of search in CODIS) with the intention of locating only the sample's actual source; but if CODIS returns only partial matches, and no exact match, the laboratory can report those partial matches to police. *Id.* 769. The end result, as with deliberate familial searches, is that police receive a list of one or more individuals possibly related to the actual source of the sample.

In Maryland, state law provides that "[a] person may not perform a search of the statewide DNA data base *for the purpose of* identification of an offender in connection with a crime for which the offender may be a biological relative of the individual from whom the DNA sample was acquired." Md. Pub. Safety Code § 2-506(d) (emphasis added). Although state laboratory personnel have stated that they do not treat "fortuitous" partial matches differently from deliberate ones, *see* Ram 755, the language of the statute prohibits only searches *"for the purpose of"* locating relatives of those profiled, Md. Pub. Safety Code § 2-506(d) (emphasis added). It may therefore be possible for Maryland to

---

searching and intend to use it to discover information about family relationships. *See* Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 Mich. L. Rev. 291, 292-294 (2010).

begin reporting partial matches discovered as a result of routine searching, and that are believed to identify relatives of the actual perpetrator, without any formalities more significant than a policy change at its state laboratory. Moreover, although the statute bars Maryland law-enforcement agencies from conducting deliberate familial searches in the state DNA database, it is unclear how the statute applies to searches of the national database by other states that do permit familial searching, like California.[11] Nor is it clear how the statute applies to searches of *local*, as opposed to "statewide," DNA databases. Finally, Maryland's statute on familial searching expires at the end of 2013. *See* 2008 Md. Laws ch. 337 § 4. Unless the legislature acts, *existing* DNA profiles may become available after 2013 for routine, deliberate familial searching.

3. Familial searching, whether deliberate or "fortuitous," poses significant privacy risks. The government's ability to determine family relationships from a DNA profile turns that profile "from a glorified genetic social security number into a blooming family tree," Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 Mich L. Rev. 291, 315 (2010)—a tree that may have branches individuals wish to keep hid-

---

[11] Other states need not obtain Maryland's permission to search the national database, which includes DNA profiles uploaded by Maryland. However, if another state obtains a match (whether partial or exact) to a Maryland DNA profile, it must obtain the personal information corresponding to that profile (such as the profiled person's name and address) from Maryland. *See* Murphy 296. Previously, FBI rules prohibited states from disclosing to each other the identity of anyone besides the "putative perpetrator." In 2006, however, the FBI changed the rules governing CODIS to permit the release of identifying information for partial matches. *See id.* 292-293.

den, or even branches that they did not know existed. A DNA profile can uncover a case of misattributed paternity; reveal biological parents after a closed adoption; or disclose the identity of a sperm or egg donor. Revelations of such intimate details can have a profound and potentially devastating emotional impact on all involved. *See* Kim 4.

Familial searching can be highly intrusive even when no hidden family relationships are disclosed. Suppose that an arrestee's profile turns up as a partial match to DNA collected from a crime scene, prompting police to investigate the arrestee's siblings, parents, and adult children as potential suspects. Such familial searching turns the arrestee into an "involuntary 'genetic informant[]'" against his own family. Murphy 320. So long as the government possesses his DNA profile, his family will forever be subject to greater potential scrutiny from police.

Such intrusions are particularly burdensome because familial searches often result in a large number of partial matches. The *relatives* of those matched—an even larger group of people—become the pool of potential suspects, even though most or all will be innocent. *See* Murphy 317 ("[B]ecause familial searches generate only possibilities, and inherently produce false positives, the follow-up investigation will necessarily focus at times upon wholly innocent persons.").

The ultimate effect of familial searches is to expand the scope of DNA databases beyond those whose DNA is profiled—here, the arrestee—to include relatives who have never have had any contact with the criminal justice system. Indeed, the entire purpose of familial searching is to target relatives who have *not* had their DNA profiles included in CODIS by virtue of such con-

tact. These relatives will have aspects of their genetic information *implicitly* stored within DNA databases by virtue of their genetic similarity to an arrestee. Such relatives may find themselves the subject of a police investigation—and suffer reputational and other harms as a result—for no reason other than their biological relationship to an individual who was previously arrested. Murphy 314. The collection of DNA samples from arrestees therefore sacrifices the privacy not only of those arrestees, but also of their family members.

4. Despite the privacy risks, familial searching is poised to expand. Virginia recently approved deliberate familial searching and validated software for such searches, and Minnesota and Pennsylvania have considered similar legislation. *See* Ram 751 n.*. And due to "an expectation of reasonable uniformity among states regarding the use of CODIS," Congress has considered legislation that would create a national platform for familial searches. Kim 2. As the prevalence of familial searching grows, the privacy risk created by collecting DNA profiles from arrestees will expand accordingly.

B. The 13 STR Loci May Contain Other Information About A Person's Traits And Characteristics

When the Department of Justice authorized the creation of the CODIS database, it emphasized that CODIS profiles should "not disclose an individual's traits, disorders, or dispositions." 73 Fed. Reg. 74,932, 74,937 (Dec. 10, 2008). That statement is largely—though not entirely—correct as a description of what can *currently* be achieved in light of present scientific knowledge: The 13 CODIS loci have not yet been definitively associated with traits of functional or medical

significance. *See* Katsanis & Wagner, *Characterization of the Standard and Recommended CODIS Markers*, 2012 J. Forensic Sci. 1, 3.[12] Nonetheless, advances in biology and medicine may eventually allow such traits and associations to be gleaned from the information in a DNA profile.

1. A CODIS profile (which reflects a person's "genotype" at several loci) may provide information regarding an individual's physical or functional traits (his "phenotype") if particular STR repeat lengths at certain loci are "associated" with particular traits. Where such a statistical association exists, the presence of the STR repeat would provide information about the probability that the trait is present.

In the case of chromosomal disorders, CODIS loci can already predict particular conditions. For example, Down syndrome results when a person inherits three copies of chromosome 21, rather than the normal two. The presence of three alleles at the D21S11 locus, a core CODIS marker located on chromosome 21, therefore predicts Down syndrome. Butler, *Genetics and*

---

[12] Petitioner cites this article, co-authored by one of the undersigned amici, for the proposition that "loci used for forensic identification do not convey any sensitive or bio-medically relevant information." *See* Pet. Br. 15 (citing Katsanis & Wagner); *see also* U.S. Br. 21 (same); Researchers' Brief 25 (same). That statement is overbroad. Although that article concluded that the CODIS markers are *currently* of "limited significance for assessing phenotypes," Katsanis & Wagner 3, it also concluded that the CODIS markers cannot be assumed to be "forever immune from any implications for potentially sensitive or medically relevant information," *id.* In addition, the research did not draw conclusions about information that may be gleaned from DNA profiles in the future nor examine the information contained in DNA profiles about family relationships, a topic the same author has addressed in other work, *see* Kim.

Genomics 260. Similarly, the presence of Edwards syndrome, which involves three copies of chromosome 18, is predicted by the presence of three alleles at the D18S51 CODIS marker on chromosome 18. *Id.*

Apart from these conditions, the best-known association between a CODIS locus and a functional trait involves the CODIS marker TH01. Several studies have shown that particular repeat lengths at the TH01 locus are statistically associated with schizophrenia. *See* Jacewicz et al., *Will genetic polymorphism of tetranucelotide sequences help in the diagnostics of major psychiatric disorders?*, 162 Forensic Sci. Int'l 24, 25-26 (2006) (reviewing studies). The plausibility of such an association is reinforced by TH01's location in an intron of the tyrosine hydroxylase gene, which codes for an enzyme that regulates the biosynthesis of certain neurotransmitters. *See id.* 24. Studies suggest that the TH01 STR locus is "involved in the regulation of transcription," the first step in gene expression, for the tyrosine hydroxylase gene. *Id.* 25 (citing study showing that certain repeat lengths lead to stronger binding of transcriptional factors). The statistical association between particular TH01 alleles and schizophrenia may be related to this regulatory function. *See id.* 26; Watson et al., *Molecular Biology of the Gene* 413 (6th ed. 2008).

Of course, the existence of a statistical association does not mean that it is strong enough to provide useful *predictive* power in determining whether a person has schizophrenia, let alone demonstrate that any particular allele plays a *causative* role in schizophrenia. The current state of scientific knowledge is inadequate to answer these questions. *See* Katsanis & Wagner 3. Future research, however, may shed more light on the strength of this association. Moreover, many other po-

tential associations between STR loci and particular traits have yet to be explored. *See* Butler, *Genetics and Genomics* 260; Katsanis & Wagner 2. Further research may reveal that some of these associations are sufficiently strong to permit statistical inferences about particular traits from CODIS profiles.

2. Lower courts have sometimes dismissed the possibility of such associations by labeling STRs as "junk DNA." *See, e.g.*, *Nicholas* v. *Goord*, 430 F.3d 652, 670 (2d Cir. 2005) ("The junk DNA that is extracted has, at present, no known function, except to accurately and uniquely establish identity.").[13] Indeed, all of the CODIS STRs lie outside of exons, the portions of genes that code for proteins. But the fact that the CODIS STRs are non-protein-coding does not mean that they have no functional relevance. *See* Pennisi, *DNA Study Forces Rethink of What It Means to Be a Gene*, 316 Science 1556, 1556 (2007) (although only two percent of a genome consists of protein-coding DNA, eighty percent of the bases studied "showed signs of being expressed"). Studies suggest that STRs sometimes play a role in regulating gene transcription. *See, e.g.*, Jacewicz 25-26; Albanèse et al., *Quantitative effects on gene silencing by allelic variation at a tetranucleotide microsatellite*, 10 Hum. Molecular Genetics 1785, 1785 (2001). Other STRs have been implicated in genetic disorders. For example, one form of myotonic dystrophy, a neuromuscular disorder, appears to be caused by particularly long repeat lengths for an STR located, like many of the core CODIS loci, in an intron of a gene. *See*

---

[13] The phrase "junk DNA" was first used to refer to non-protein-coding DNA in the title of a 1972 talk. *See* Wagner, Letter to the Editor, 2012 J. Forensic Sci. at 1. Although it has become a "ubiquitous phrase," much of the scientific community has rejected it. *See id.*

Ranum & Cooper, *RNA-Mediated Neuromuscular Disorders*, 29 Ann. Rev. Neuroscience 259, 260-261 (2006).[14] Similarly, Friedreich's ataxia, a neurodegenerative disease, appears to be caused by long repeat lengths of another STR that is also located in an intron. *See* Bidichandani, *The GAA Triplet-Repeat Expansion in Friedreich Ataxia*, 62 Am. J. Hum. Genetics 111, 111 (1998). Scientists continue to conduct research on the functional relevance of STRs, and that research may well implicate the CODIS core loci in other conditions and traits, particularly those loci within introns of genes.

Moreover, particular STR repeats may be associated with physical or functional traits even if they play no role in gene regulation. A CODIS allele is "linked" with another allele responsible for a particular trait if the two alleles are physically located in close proximity on the chromosome. Where such a "linkage" exists, the two alleles are particularly likely to be transmitted together from one generation to the next. Watson 17. Medical science takes advantage of this phenomenon by using STRs as genetic "markers" for the presence of other genetic variants—including those that cause dis-

---

[14] The Researchers' Brief (at 19) acknowledges this example but distinguishes it on the basis that the STR involved is in a "different part of the genome than any of the CODIS tetranuc[l]eotide repeats." That is correct in the literal sense that the STR locus involved in myotonic dystrophy type 2 is not one of the core CODIS loci, and therefore is in "a different part of the genome." The ultimate point, however, is not that any of the core CODIS loci play a role in myotonic dystrophy, but rather that STRs of the same type as some core CODIS loci—that is, tetranucleotide repeats located in the introns of genes—can cause certain medical conditions. As the Researchers' Brief acknowledges (at 20), it is at least possible that some current CODIS loci play a similar role.

ease—that are difficult to find directly. The result is that a particular STR repeat length may occur together with a particular genetic variant at rates beyond that predicted by mere chance, a phenomenon known as "linkage disequilibrium." *See* Krebs 166-167. If the genetic variant causes or contributes to a particular medical condition or physical characteristic, the presence of the corresponding STR repeat length would make it more statistically likely that the genetic variant, and hence the associated attribute, is present. *Id.*[15]

Such linkages are most likely to occur with the several CODIS loci that are located within or near genes with known medical significance. *See* Katsanis & Wagner 2 tbl.1, 3 tbl.2. The CODIS marker D18S51, for example, is located within the *BCL2* gene, variants of which can cause leukemia and lymphoma. *Id.* 3 tbl.2. To be sure, mere proximity does not mean that any particular repeat length is definitively linked with the specific *BCL2* variants that cause those disorders. So far, scientists have not confirmed that any CODIS alleles are linked with any genetic variants of medical significance. *Id.* Nonetheless, given the proximity of the CODIS loci to genes of medical significance, it is possible that scientists will discover such linkages in the future. Were such a linkage to be discovered, that information could be used in conjunction with *existing* CODIS profiles to predict the likelihood that an individual possesses those particular traits.

---

[15] "Association" refers to a statistical correlation between genotype (for example, the presence of certain alleles) and phenotype (for example, a particular physical trait). "Linkage disequilibrium" refers to a statistical correlation between the presence of one allele at one locus and the presence of another allele at a different locus. *See* Khoury et al., *Fundamentals of Genetic Epidemiology* 44-45, 74-75 (1993).

C. Advances In Technology May Lead To More Intrusive Profiling Technologies

Advances in technology present risks that DNA profiling will become even more intrusive and will reveal more personal information about individuals in the future. For example, it is feasible to build DNA profiles by sequencing an individual's entire genome, or a part of that genome. Academic and government forensic laboratories are developing this technology for forensic uses, and medical centers are using whole genome sequencing routinely. *See* Presidential Commission for the Study of Bioethical Issues 22. Whole genome sequencing entails determining each of the billions of base pairs in the complete DNA sequence making up an individual's genome. *Id.* 16. Because of the wealth of information that would be contained in profiles built on such sequencing, they would be extraordinarily powerful for matching individuals to DNA samples, even when the DNA of multiple contributors is present, or the sample is damaged or degraded. *See* Berglund et al., *Next-generation sequencing technologies*, 2 Investigative Genetics, at 12-13 (2011). However, whole genome sequencing also "dramatically raises the privacy stakes," because it extracts "large amounts of biological and medical information that is not only inherently unique to a single person but also has implications for blood relatives." Presidential Commission for the Study of Bioethical Issues, *Privacy and Progress in Whole Genome Sequencing* 24 (2012), *available at* http://www.bioethics.gov/cms/node/764.

More detailed methods of DNA profiling, short of genome sequencing, may become available even sooner. One technology readily accessible to law enforcement involves profiling of Single Nucleotide Polymorphisms (SNPs), genetic variants at a single base at a particular

locus. *See* Butler, *DNA Typing* 182. SNP alleles may have greater predictive value for human traits than STRs; one advantage cited for this profiling method is that "the ability to predict ethnic origin and certain physical traits may be possible with careful selection of SNP markers." *Id.* 183; *see also id.* 192-194 (discussing new profiling technologies using *Alu* insertion polymorphisms, which have "the potential to yield information about the geographic/ethnic origin of the sample being tested"). Finally, and more imminently, the FBI has already announced its plans to expand the number of STR loci used in CODIS, raising additional privacy concerns regarding the amount of information these loci may contain.[16]

As the data stored in DNA profiles increases, the amount of inforr ation that can be inferred about the individual profiled increases accordingly. At the extreme, whole genome sequencing would reveal almost all of the vast amounts of information contained in an individual's DNA. *See infra* pp. 31-32. The risks posed by these ever-more-sophisticated profiling technologies merit consideration in evaluating the Fourth Amendment concerns raised by collecting DNA profiles from arrestees. *See supra* pp. 13-14.

---

[16] *See* FBI, *Planned Process and Timeline for Implementation of Additional CODIS Core Loci*, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/planned-process-and-timeline-for-implementation-of-additional-codis-core-loci (last visited Feb. 1, 2013).

II. A Retained DNA Sample Can Reveal Even More Intimate Details About The Individual

After creating a CODIS profile, forensic laboratories retain the DNA sample used to create that profile. These samples contain even more information than a DNA profile—indeed, they contain a person's entire genetic makeup. This practice thus puts the government in possession of an enormous amount of private information.

To create a CODIS profile, the government first takes a DNA sample that contains an individual's entire genome. Under most jurisdictions' current practice, law-enforcement agencies retain the individual's DNA sample along with the profile, and may use that sample to confirm matches found in the future.[17] Moreover, in many states de-identified samples may be used for a variety of non-law-enforcement purposes, such as medical research and compiling population statistics.[18] Simoncelli, *Dangerous Excursions*, 34 J. L. Med. & Ethics 390, 392 (2006).

Retention of a DNA sample threatens privacy far more than other identification techniques commonly used by law enforcement. Although the United States (at 19) suggests that DNA profiling is no more intru-

---

[17] A minority of jurisdictions require destruction of a biological sample after a DNA profile is generated. *See* Axelrad, *Survey of State DNA Database Statutes* 5 (2005), *available at* http://www.aslme.org/dna_04/grid/guide.pdf.

[18] Under the Maryland statute at issue here, the state's DNA repository retains all DNA samples from which DNA profiles are developed for later uses, including "for research and administrative purposes." Md. Pub. Safety Code § 2-505(a). However, the state must destroy a sample and expunge all related records if an arrest does not result in a conviction. *Id.* § 2-511.

sive than fingerprinting, that is simply not so. A fingerprint—which is merely a representation of the outside of a person's fingertip—imparts little more information than to whom it belongs. By contrast, the scope of personal information that can or could be gleaned from a DNA sample has few bounds and includes information in which a person does have a reasonable expectation of privacy, such as to whom he is related or what diseases he has or is likely to get.

At present, DNA samples provide insight into a vast array of private information about a person, including the person's "disease predisposition, physical attributes, and ancestry." Simoncelli 391-392. Analysis of DNA alone can determine whether a person was born a male or female; his natural eye and hair color; to whom he is related and how closely; in which parts of the world his ancestors lived; and whether he already suffers from or is likely to acquire (or pass on to his children) any among hundreds of diseases, including Huntington's chorea, sickle cell anemia, and beta thalassemia. *See, e.g.*, Chen et al., *Personal Omics Profiling Reveals Dynamic Molecular and Medical Phenotypes*, 148 Cell 1293 (2012); Hindorff et al., *Potential Etiologic and Functional Implications of Genome-wide Association Loci*, 106 Procs. Nat'l Acad. Scis. 9362 (2009).

As science progresses, the government will be able to discover even more personal and sensitive information about an individual from his DNA sample. Significant research is already underway to identify genetic markers associated with a range of visible physical traits—including height, hair texture, and facial features, *see, e.g.*, Pulker et al., *Finding Genes That Underlie Physical Traits of Forensic Interest*, 1 Forensic Sci. Int'l: Genetics 100, 101-104 (2007)—and even psy-

chological and behavioral characteristics, including aggression, violent or antisocial behavior, sexual orientation, propensity for smoking, and intelligence. *See, e.g.*, Kayser & Schneider, *DNA-based Prediction of Human Externally Visible Characteristics*, 3 Forensic Sci. Int'l: Genetics 154, 155 (2009); Koops & Schellekens, *Forensic DNA Phenotyping*, 9 Colum. Sci. & Tech. L. Rev. 158, 164-165 (2008); Widom & Brzustowicz, *MAOA and the "Cycle of Violence,"* 60 Biological Psychiatry 684 (2006). Notably, many such DNA-based predictive tests use non-coding genetic markers that are associated with a given characteristic. *See* Kayser & Schneider 157-158.[19]

Although most state statutes protect against intentional misuse of reference samples, only a handful of states expressly prohibit testing offender DNA for such medical, psychological, or phenotypical information.[20] *See* Murphy 335 n.171. For the most part, so long as samples are retained, they will be available for

---

[19] The likelihood that the government will seek to perform additional testing on collected samples as science progresses is not mere speculation. Research is currently underway to develop technology to conduct whole genome sequencing on reference samples. *See* Davis & Budowle, *DNA Profiling of Database Reference Samples Using Second Generation Sequencing*, International Symposium on Human Identification (Oct. 17, 2012), *available at* http://www.promega.com/~/media/files/resources/conference%20proceedings/ishi%2023/oral%20presentations/12-davis.pdf?la=en.

[20] The Maryland statute permits DNA testing "(1) to analyze and type the genetic markers contained in or derived from the DNA samples; (2) as part of an official investigation into a crime; (3) to help identify human remains; (4) to help identify missing individuals; and (5) for research and administrative purposes." Md. Pub. Safety Code § 2-505(a). The only other limitation is that DNA records must "directly relate to the identification of individuals." *Id.* § 2-505(b)(1).

study using these new tests, subject only to the restriction that they are used "for law enforcement identification purposes." 42 U.S.C. § 14132(b) (limiting circumstances in which law enforcement may disclose stored DNA samples and DNA analyses). That restriction may not prove particularly limiting. If, for example, police know from other evidence that the perpetrator is diabetic, they theoretically could analyze DNA samples in their possession to identify suspects with genes that cause diabetes; that analysis would presumably be done for "identification purposes." Permitting law enforcement access to such a rich store of personal information from an arrestee who is presumed innocent is a serious, and unprecedented, incursion on core privacy interests.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals of Maryland.

Respectfully submitted.

DANIELLE SPINELLI
Counsel of Record
ANNIE L. OWENS
WEILI J. SHAW
NICOLE RIES FOX*
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
danielle.spinelli@wilmerhale.com

* *Admitted to practice in the State of California. Supervision by members of the firm who are members of the District of Columbia Bar.*

FEBRUARY 2013

AMICUS CURIAE BRIEF

No. 12-207

IN THE

Supreme Court of the United States

STATE OF MARYLAND,
Petitioners,

v.

ALONZO JAY KING, JR.
Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF OF *AMICUS CURIAE* PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA IN SUPPORT OF RESPONDENT

SANDRA K. LEVICK
Counsel of Record
SONAM HENDERSON*
TARA MIKKILINENI
PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA
633 Indiana Avenue, N.W.
Washington, D.C. 20004
(202) 628-1200
SLevick@pdsdc.org

Counsel for Amicus Curiae

*Admitted only in NY; supervised by members of D.C. Bar

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	3
I. Maryland's Seizure Of DNA Is Far More Intrusive Than Fingerprinting	3
A. Maryland's Procedure For Seizing DNA Is More Physically Intrusive Than Fingerprinting.	3
B. The DNA Sample Maryland Seizes Contains Far More Private Information Than A Set Of Fingerprints	5
C. The Purported Limitations In The Maryland Act Do Not Meaningfully Limit Maryland's Ability To Access And Use The Data In The DNA Samples It Takes From Arrestees.	7
II. Maryland's Taking And Analyzing DNA Samples Clearly Constitutes A Search, While Fingerprinting May Not Be A Search	14
III. The Purpose of Fingerprinting Is To Identify. Maryland's Purpose In Seizing Arrestee DNA Is To Investigate Unsolved Crimes	18

TABLE OF CONTENTS—Continued

Page

A. Unlike Fingerprinting, Whose Primary Purpose Has Always Been Identification, The Primary Purpose Of DNA Sampling Is To Investigate... 19

B. Taking Fingerprints For Investigation Triggers Fourth Amendment Concerns That Taking Them For Identification Does Not. 29

CONCLUSION 33

APPENDICES

APPENDIX A: Letter From State's Attorney To Hon. Brian E. Frosh And Hon. Joseph F. Vallario, Dated March 7, 2008 ..... 1a

APPENDIX B: Letter From The Fraternal Order Of Police To Brian E. Frosh, Dated February 27, 2008 ..... 4a

APPENDIX C: Statement Of Governor Martin O'Malley On Senate Bill 211, Dated February 13, 2008 ..... 6a

TABLE OF AUTHORITIES

CASES	Page
Arizona v. *Gant*, 556 U.S. 332 (2009)	18
Arizona v. *Hicks*, 480 U.S. 321 (1987)	15, 17
Davis v. *Mississippi*, 394 U.S. 721 (1969)	30
Dickerson v. *United States*, 530 U.S. 428 (2000)	14
Ferguson v. *City of Charleston*, 532 U.S. 67 (2001)	14
Florence v. *Board of Chosen Freeholders*, 132 S.Ct. 1510 (2012)	17
Friedman v. *Boucher*, 580 F.3d 847 (9th Cir. 2009)	31
Haskell v. *Brown*, 677 F.Supp.2d 1187 (N.D. Cal. 2009)	29
Haskell v. *Harris*, 669 F.3d 1049 (9th Cir. 2012)	29
Hayes v. *Florida*, 470 U.S. 811 (1985)	30
Hiibel v. *Sixth Judicial Dist. Court*, 542 U.S. 177 (2004)	17
INS v. *Lopez-Mendoza*, 468 U.S. 1032 (1984).	31
Katz v. *United States*, 389 U.S. 347 (1967)	20
King v. *State*, 425 Md. 550, 42 A.3d 549 (Md. 2012)	7, 17, 27, 28
Kyllo v. *United States*, 533 U.S. 27 (2001)	2
Maryland v. *Buie*, 494 U.S. 325 (1990)	18
McGovern v. *Van Riper*, 54 A.2d 469 (N.J. Ch. 1947)	21

TABLE OF AUTHORITIES—Continued

	Page
Schmerber v. *California*, 384 U.S. 757 (1966)	16
Skinner v. *Ry. Labor Execs. Ass'n*, 489 U.S. 602 (1989)	4, 14
Smith v. *United States*, 324 F.2d 879 (D.C. Cir. 1963)	21
Tolentino v. *New York*, 926 N.E.2d 1212 (N.Y. 2010), *cert. granted*, 131 S. Ct. 595, (2010) (No. 09-11556), *cert. dismissed as improvidently granted*, 131 S. Ct. 1387 (2011)	15
United States v. *Garcia-Beltran*, 389 F.3d 864 (9th Cir. 2004)	30, 31
United States v. *Guevara-Martinez*, 262 F.3d 751 (8th Cir. 2001)	31
United States v. *Jones*, 132 S.Ct. 945 (2012)	2, 15, 16, 17
United States v. *Kelly*, 55 F.2d 67 (2d Cir. 1932)	20-21
United States v. *Kincade*, 379 F.3d 813 (9th Cir. 2004)	14, 20
United States. v. *Mitchell*, 652 F.3d 387 (3d Cir. 2011)	23, 28, 29
United States v. *Olivares-Rangel*, 458 F.3d 1104 (10th Cir. 2006)	31
United States v. *Oscar-Torres*, 507 F.3d 224 (4th Cir. 2007)	31
Winston v. *Lee*, 470 U.S. 753 (1985)	32

TABLE OF AUTHORITIES—Continued

CONSTITUTION Page

U.S. Const. amend IV ..... *passim*

STATUTES

Md. Code Ann., Pub. Safety (West 2012):
§ 2-501 *et seq* 3
§ 2-501 ..... 9, 13
§ 2-502(a) 9
§ 2-502(c)(3) 9
§ 2-503(b) 9
§ 2-504(d)(1) 22
§ 2-505(a) 11
§ 2-505(a)(2) 22
§ 2-505(a)(3) 22
§ 2-505(a)(4) 22
§ 2-505(a)(5) 22
§ 2-505(b) 10
§ 2-506(a) 9
§ 2-509(c)(2) 9
§ 2-511 ..... 13, 23
§ 2-512(c) 10

Md. Code Regs. 29.05.01.04(B)(4) 22

Md. Code Regs. 29.05.01.04(C) 3

Md. Code Regs. 29.05.01.04(L) 23

Md. Code Regs. 29.05.01.06(C) 11

Md. Code Regs. 29.05.01.07(C) 23

OTHER AUTHORITIES

Butler, John, *Forensic DNA Typing* (2005) 6

TABLE OF AUTHORITIES—Continued

Page

Caspi, Avshalom, *et al.*, *Role of Genotype in the Cycle of Violence in Maltreated Children*, 297 Science 851 (2002) 12-13

Cole, Simon A., *Don't Shoot the Messenger by One of the Messengers: A Response to Merlino et al.*, 45 Tulsa L. Rev. 111 (2009).. 29

Cole, Simon A., *Suspect Identities: A History of Fingerprinting and Criminal Identification* (2001)..... 20

Dean, Laura and McEntyre, Jo, *The Genetic Landscape of Diabetes* (2004), *available at* http://www.ncbi.nlm.nih.gov/books/NBK1667/?redirect-on-error=__HOME__ (last visited Jan. 30, 2013). 6

DNA Analysis Backlog Elimination Act of 2000, H.R.Rep. No. 106-900(I) 25

Dockser Marcus, Amy, *How Genetic Testing May Spot Disease Risk, Wall Street Journal*, May 4, 2010, *available at* http://online.wsj.com/article/SB10001424052748704342604575222082732063418.html (last visited Jan. 30, 2013) 6-7

Federal Bureau of Investigation, *CODIS and NDIS Fact Sheet*, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet (last visited Jan. 30, 2013). 9, 26

Federal Bureau of Investigation, *IAFIS Fact Sheet*, http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis_facts (last visited Jan. 30, 2013) 14, 26

TABLE OF AUTHORITIES—Continued

Page

Federal Bureau of Investigation, *Fingerprint Identification*, http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/fingerprint-overview (last visited Jan. 30, 2013) 5

Federal Bureau of Investigation, *Five Key Services*, http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis_services (last visited Jan. 30, 2013) 25, 28

Federal Bureau of Investigation, *Integrated Automated Fingerprint Identification System homepage*, http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis (last visited Jan. 30, 2013) 26

Federal Bureau of Investigation, *Seeing the Invisible*, http://www.fbi.gov/news/stories/2011/november/dna_112311 (last visited Jan. 30, 2013). 28

Frazetto, Giovanni, *et al.*, *Early Trauma and Increased Risk for Physical Aggression During Adulthood: The Moderating Role of MAOA Genotype*, PloS One2(5): e486. Doi10.1371/journal.pone.0000486 (2007) 12

Genetests, http://www.ncbi.nlm.nih.gov/sites/GeneTests/?db=GeneTests (last visited Jan. 30, 2013) 6

TABLE OF AUTHORITIES—Continued

Page

Human Genome Project Information, *DNA Forensics* (2009), http://www.ornl.gov/sci/techresources/Human_Genome/elsi/forensics.shtml (last visited Jan. 30, 2013) 6

Indiana University, *Researchers Identify Key Genes and Prototype Predictive Test for Schizophrenia* (2012), http://homepages.indiana.edu/web/page/normal/22382.html (last visited Jan. 30, 2013) 6

Letter from John J. McCarthy, State's Attorney, Montgomery County, and Ike Leggett, County Executive, Montgomery County, to Sen. Brian E. Frosh and Sen. Joseph F. Vallano, Chairmen, Senate Judicial Proceedings Committee (Mar. 7, 2008)..... 24

Letter from John "Rodney" Bartlett, Jr., President, Fraternal Order of Police, Maryland State Lodge, to Sen. Frosh (Feb. 27, 2008)..... 24

McDermott, Rose, *et al.*, *Monoamineoxadise A gene (MAOA) Predicts Behavioral Aggression Following Provocation*, 106 Proc. Nat'l Acad. Sci. 2118 (2009) 12

Murphy, Erin, *Relative Doubt: Familial Searches of DNA Databases*, 109 Mich. L. Rev. 281 (2010) 7

TABLE OF AUTHORITIES—Continued

Page

National Center for Biotechnology Information, *Genome Mapping: A Guide to the Genetic Highway We Call the Human Genome* (2004), http://www.ncbi.nlm.nih.gov/About/primer/mapping.html (last visited Jan. 30, 2013) 12

Online Mendelian Inheritance in Man, *Gene Map Statistics*, http://www.omim.org/statistics/geneMap (last visited Jan. 30, 2013)..... 6

Ram, Natalie, *Fortuity and Forensic Familial Identification*, 63 Stan. L. Rev. 751 (2011) 26

Statement of Governor Martin O'Malley on Senate Bill 211, Senate Judicial Proceedings Committee (Feb. 13, 2008)..... 24

Statement of Doug Hares, FBI Custodian of the National DNA Database, Nov. 23, 2011, http://www.fbi.gov/news/stories/2011/november/dna_112311 (last visited Jan. 30, 2013) 25

The Economist, *The Genetics of Politics: Body Politic*, Oct. 6, 2012, *available at* http://www.economist.com/node/21564191 (last visited Jan. 30, 2013)..... 7

The Scientific Working Group for DNA Analysis Methods, http://www.swgdam.org/FBI%20Director%20Forensic%20Standards%20%20Revisions%20APPROVED%20and%20Final%20effective%209-01-2011.pdf (last visited Jan. 30, 2013)..... 27

TABLE OF AUTHORITIES--Continued

Page

Zhao, Roseanne F., *The Power of Sequencing Single Cell Genomes*, National Human Genome Research Project (2013), http://www.genome.gov/27552295 (last visited Jan. 30, 2013) 5

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Public Defender Service for the District of Columbia (PDS) represents indigent criminal defendants in the District of Columbia. Attorneys employed by *amicus* regularly represent clients who, in addition to charges in the District of Columbia, are facing charges or whose family members are facing charges in jurisdictions, including Maryland, that take DNA samples from arrestees. As such, PDS is concerned not only with the apparent trend towards expanding DNA sample collection to arrestees, and the eventuality that it will reach the District of Columbia, but also with the current Maryland statute and similar provisions under Virginia and federal law. DNA sample collection has often, including in the instant case, been defended by analogy to the longstanding practice of fingerprinting. In *amicus*'s view, that analogy breaks down on several key dimensions, and does not constitute a basis on which to decide this case.

SUMMARY OF THE ARGUMENT

Throughout their briefs, petitioners and *amici* in support of reversing the Maryland Court of Appeals argue that this case can be resolved by reference to a simple analogy. By their lights, Maryland's program of taking DNA samples from arrestees is merely the twenty-first century analogue to the longstanding practice of fingerprinting arrestees at booking. They would short circuit the Fourth Amendment analysis

---

[1] Both parties have filed letters with the Court consenting to the filing of *amicus curiae* briefs in support of either or neither party. No counsel for any party authored any part of this brief, and no person or entity, other than *amicus*, has made a monetary contribution to the preparation or submission of this brief.

and skip straight to a conclusion that since fingerprinting has become an accepted aspect of police post-arrest procedure, this modern equivalent is beyond question as well.

The analogy is not without allure. But this Court has carefully scrutinized new law enforcement technologies to ensure that, as technology exposes to view information previously unavailable to the government—information hidden by the walls of our homes or the skin of our bodies and the walls of our cells—the protections of the Fourth Amendment continue to preserve "that degree of privacy against government that existed when the Fourth Amendment was adopted." *See Kyllo* v. *United States*, 533 U.S. 27, 34-35 (2001).[2] On closer examination, the analogy between sampling arrestee DNA and fingerprinting breaks down on several key dimensions. Sampling arrestee DNA requires a far more significant physical intrusion than fingerprinting. It places in the State's hands a trove of private information that fingerprints do not. It is unquestionably a search, whereas fingerprinting may or may not be. And the purposes of the two procedures are wholly distinct. Fingerprints are used to confirm the identities of arrestees and link them to their criminal files. Maryland's program

---

[2] *See also United States* v. *Jones*, 132 S.Ct. 945, 955-56 (2012) (Sotomayor, J., concurring) (apparent analogy between a traditional law enforcement practice (surveillance) and a technological advance (GPS monitoring) fails because the new technology allowed police to gather more information than would have been practicable with the traditional technique as well as to "evade[] the ordinary checks that constrain abusive law enforcement practices: 'limited police resources and community hostility'").

of taking DNA samples from arrestees[3] was not adopted to help identify those arrestees, but rather as an investigative tool to link arrestees to unsolved crimes. These distinctions are reinforced by both the structure of the Act and the relative structures of the DNA and fingerprint databases. Because DNA collected after arrest is not an effective means of identifying arrestees, but is instead useful primarily as an *investigative* tool, its collection crosses a Fourth Amendment boundary that fingerprinting does not. In short, despite its superficial appeal, the analogy between fingerprinting arrestees and sampling their DNA cannot stand.

ARGUMENT

I. Maryland's Seizure Of DNA Is Far More Intrusive Than Fingerprinting.

A. Maryland's Procedure For Seizing DNA Is More Physically Intrusive Than Fingerprinting.

In order to seize an arrestee's DNA sample, police insert an instrument inside the arrestee's mouth and scrape material from the inside of his or her cheek. Petitioner's Br. 13; U.S. Br. 4. If an arrestee does not accede to the procedure, police may use "reasonable force" to obtain access to the inside of the arrestee's mouth and take a sample. Md. Code Regs. 29.05.01.04(C) (2012). In contrast, taking a set of fingerprints requires only the handling of the arrestee's hands and fingers. Accordingly, an analogy between fingerprinting and Maryland's seizure of DNA sam-

---

[3] The Maryland statutory provisions governing DNA collection are codified at Md. Code Ann., Pub. Safety § 2-501 *et seq.* (West 2012) [hereinafter "the Act"].

ples from arrestees requires equating the government's touching the exterior of an arrestee's hands with penetration of an internal body cavity to seize tissue. That equation does not compute. *See Skinner* v. *Ry. Labor Execs Ass'n*, 489 U.S. 602, 616-17 (1989) ("[I]t is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable.").

Hands and fingers may be the area of the body in which people have the weakest expectations of privacy. Hands are constantly visible, covered in public only when cold weather requires it. Hands and fingers are handled by others as a matter of course in daily life. People use handshakes to introduce themselves, greet acquaintances, seal deals, and make up after disagreements; schoolchildren hold hands in lines and when crossing streets; perfect strangers exchange high-fives at sporting events.

Societal norms, and with them, a person's expectations of privacy, are far different with regard to the mouth. The mouth is a portal into the body, an intimate area that basic mores counsel people to keep private. We close our mouths when we chew. We cover our mouths when we yawn. And we do not go around handling the mouths of others, or, as Maryland does to its arrestees, sticking implements into them. That people put toothbrushes in their own mouths, as the United States observes,[4] does not

---

[4] The United States argues that the intrusion of cheek swabbing is "negligible" and "at most a minimal one" because, *inter alia*, "the inside of the cheek is . . . accustomed to touching with a toothbrush." U.S. Br. 17-18. Similarly, *amicus* the National District Attorneys Association [hereinafter "NDAA"] states that

diminish the private nature of the mouth's interior, any more than any other touching or cleaning of other private areas of the body during a person's daily *toilette* renders those areas available for government inspection.

In short, the interior of the mouth is an intimate and private area, while hands and fingers are basic points of contact with the world at large.

B. The DNA Sample Maryland Seizes Contains Far More Private Information Than A Set Of Fingerprints.

A fingerprint is, trivially, an image of the patterning in the skin of an individual's finger.[5] Prints were traditionally taken by inked impression; now many agencies use electronic scanning technology. In either case, when a person is fingerprinted, all that is taken is that image of the surface attributes of his or her fingers.

In contrast, the DNA samples that Maryland takes contain the entire human genome.[6] Each sample includes personal information about an arrestee's family relationships, including true parentage, that may even be unknown to the arrestee. It also includes all genes responsible for the arrestee's

---

buccal swabbing "is no more intrusive and takes less time than brushing one's teeth." NDAA Br. 7-8.

[5] *See* Federal Bureau of Investigation, *Fingerprint Identification*, http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/fingerprint-overview (last visited Jan. 30, 2013) (fingerprints are "impressions made by the minute ridge formations or patterns found on the fingertips").

[6] Roseanne F. Zhao, *The Power of Sequencing Single Cell Genomes*, National Human Genome Research Project (2013), http://www.genome.gov/27552295 (last visited Jan. 30, 2013).

hereditary traits including such sensitive and personal matters as "susceptibility to particular diseases . . . and perhaps predispositions to certain behaviors and sexual orientation."[7] The Online Mendelian Inheritance in Man project, maintained by the Johns Hopkins University School of Medicine, provides a comprehensive compendium of the relationships between genes and their physical expression (phenotypes) and keeps a running tally of phenotypes for which the genetic molecular basis is known; the current count is over 4800.[8] Genetest, an initiative of the National Center for Biotechnology Information at the National Institute for Health, reports there are currently tests for 2944 genetic diseases.[9] There is ongoing research focused on mining the genome for susceptibility to such conditions as schizophrenia, diabetes, heart disease, and even for such complicated behaviors as political inclination.[10] As the

---

[7] Human Genome Project Information, *DNA Forensics* (2009), http://www.ornl.gov/sci/techresources/Human_Genome/elsi/forensics.shtml (last visited Jan. 30, 2013); John Butler, Forensic DNA Typing 17 (2005) ("DNA provides a 'computer program' that determines our physical features and many other attributes.").

[8] Online Mendelian Inheritance in Man, *Gene Map Statistics*, http://www.omim.org/statistics/geneMap (last visited Jan. 30, 2013).

[9] Genetests, http://www.ncbi.nlm.nih.gov/sites/GeneTests/?db=GeneTests (last visited Jan. 30, 2013).

[10] Indiana University, *Researchers Identify Key Genes and Prototype Predictive Test for Schizophrenia* (2012), http://homepages.indiana.edu/web/page/normal/22382.html (last visited Jan. 30, 2013); Laura Dean and Jo McEntyre, *The Genetic Landscape of Diabetes* (2004), Chapters 2-4, *available at* http://www.ncbi.nlm.nih.gov/books/NBK1667/?redirect-on-error=__HOME__&depth=1 (last visited Jan. 30, 2013); Amy Dockser Marcus, *How Genetic Testing May Spot Disease Risk*, Wall Street Journal, May

Maryland Court of Appeals aptly stated, the DNA sample collected and retained by the State contains a "vast genetic treasure map." *King* v. *State*, 42 A.3d 549, 577 (Md. 2012). That map gains detail with each passing day.

C. The Purported Limitations In The Maryland Act Do Not Meaningfully Limit Maryland's Ability To Access And Use The Data In The DNA Samples It Takes From Arrestees.

Petitioners and *amici* contend that the analogy between fingerprinting and Maryland's seizure of DNA samples is nonetheless valid because the Maryland Act has been structured to make most of this information off-limits to the State. They assert that the only use of arrestees' DNA samples permitted by Maryland law is to derive a DNA profile consisting solely of the 13 core loci indexed by the federal CODIS database.[11] Petitioner and *amici* maintain that this CODIS profile contains no information

---

4, 2010, http://online.wsj.com/article/SB10001424052748704342604575222082732063418.html (last visited Jan. 30, 2013); The Economist, *The Genetics of Politics: Body Politic*, Oct. 6, 2012, *available at* http://www.economist.com/node/21564191 (last visited Jan. 30, 2013).

[11] The Combined DNA Index System ("CODIS") is the repository for local, state and national DNA information. "'CODIS' is the name of software developed by the FBI to conduct searches of genetic profiles, but it has come to stand for the idea of the national database itself." Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 Mich. L. Rev. 291, 296 (2010).

about genetic traits beyond gender and an otherwise meaningless numerical identifier.[12]

Even were the State limiting itself to extracting only a CODIS profile from the DNA samples it collects, the forcible collection of those samples would nonetheless be more intrusive by far than rolling fingers for prints. But, notwithstanding Maryland's assurances that the Act prohibits it from using the samples to do anything other than generate CODIS profiles, the Act contains no such constraints.

The provisions related to the State's DNA testing program are at Title 2, Subtitle 5 of the Maryland Code, Public Safety. The Subtitle provides for a number of different State functions with regard to DNA, for example, creation of a statewide DNA database, collection of DNA samples, testing of those samples and reporting requirements with regard to the progress and efficacy of the system. CODIS is mentioned at several points in the statute, but only with regard to one of the Act's several functions, developing a statewide database, and exclusively as a guidepost for ensuring that the State's population

---

[12] *See* Petitioner's Br. 16 ("These regulations similarly limit the information extracted from arrestee samples to a standard set of non-coding alleles, from which the State learns nothing aside from the gender of the individual and 13 pairs of numbers which, on their own, signify nothing."); U.S. Br. 19 (Maryland law "contemplates" CODIS profiles, which consist of "nothing more than a long list of numbers that reflect[] the repeated occurrence of particular genetic material at each of 13 loci"); *see also* NDAA Br. 13-14; Global Alliance for Rapid DNA Testing [hereinafter "Global Alliance"] Br. 16.

database of DNA profiles is compatible with the federal database.[13]

In addition to providing minimum standards for record keeping and testing and handling of samples, the references to CODIS in the Act do operate to set a floor on the information that the State must extract from arrestees' samples. However, they set no ceiling. The Act does not limit what additional information the State may extract once it has extracted the CODIS information. All the law requires is CODIS compatibility; all that compatibility requires is that, when extracting information from a sample, the State take the 13 CODIS loci in addition to whatever additional information it might want.[14] For example, without endangering compatibility, a state

---

[13] *See* Md. Code Ann., Pub. Safety § 2-501 (defining CODIS); *id.* at § 2-502(a), (c)(3) (creating "a statewide DNA data base system in the Crime Laboratory" and imposing on the Director of the Crime Laboratory the duty to "ensure compatibility with Federal Bureau of Investigation and CODIS requirements, including the use of comparable test procedures, quality assurance, laboratory equipment, and computer software"); *id.* at § 2-503(b) (mandating that "[e]ach procedure adopted by the Director shall include quality assurance guidelines to ensure that DNA records meet standards and audit requirements for laboratories that submit DNA records for inclusion in the statewide DNA data base system and CODIS"); *id.* at § 2-506(a) (permitting Crime laboratory to share DNA profiles "as necessary to participate in CODIS"); *id.* at § 2-509(c)(2) ("population data base may be made available to and searched by any agency that participates in CODIS").

[14] Indeed, CODIS appears to accept profiles for uploading containing information beyond the 13 CODIS loci. Federal Bureau of Investigation, *CODIS and NDIS Fact Sheet*, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet (last visited Jan. 30, 2013) (13 standard CODIS loci the "minimum loci requirement[]" for most specimen categories).

could analyze each sample for 20, 50, or even 100 loci, but upload only the 13 CODIS loci into the national database. In fact, it appears that Maryland already routinely analyzes DNA samples at two additional loci beyond the CODIS loci, for a total of 15, as well as another gene indicating sex. Respondent's Br. 47 n.23. Thus, while the law clearly contemplates that the State will derive from the DNA samples a DNA profile compatible with CODIS using procedures that meet FBI standards, there is nothing actually prohibiting the State from using the samples to extract information about arrestees beyond what it contained in the 13 CODIS loci.

Moreover, if the State collects additional genetic data beyond the 13 CODIS loci, there is nothing in the law that restricts the State to analyzing only non-coding alleles. There are simply no words to that effect in the statute. Instead, the operating limitation that Petitioner and some of the *amici* point to is the criminal penalty for "willfully test[ing] a DNA sample for information that does not relate to the identification of individuals as specified in this subtitle." Md. Code Ann., Pub. Safety § 2-512(c); *see also id.* at § 2-505(b)(1) ("Only DNA records that directly relate to the identification of individuals shall be collected and stored."). There is no definition for information that "relate[s] to the identification of individuals" in the statute, but the term clearly means something far broader than the standard definition of "identification": confirming a person's name and pulling up records associated with him or her. For instance, it is unquestionably permissible under the Act to use the DNA samples to investigate crimes by linking the individuals from whom the samples have been taken to evidence from crime scenes.

The broad discretion to rummage through an arrestee's genome that the Act affords Maryland is further borne out by the section of the Act titled "Purposes of testing DNA samples," which lays out five broad purposes for collecting and testing DNA samples: "(1) to analyze and type the genetic markers contained in or derived from the DNA samples; (2) as part of an official investigation into a crime; (3) to help identify human remains; (4) to help identify missing individuals; and (5) for research and administrative purposes, including . . . support of identification research and protocol development of forensic DNA analysis methods[.]" *Id.* at § 2-505(a).[15] Clearly, information that "relate[s] to the identification of individuals" must encompass information that could be used to fill one or more of those five purposes laid out in the statute. And under any one of those five purposes, the State could test samples for alleles beyond the 13 CODIS loci, including alleles coding for physical or behavioral traits. For instance, additional alleles would give the State more identifying power for "identify[ing] human remains" and "missing individuals." This would be especially true of alleles allowing the State to identify persons who are related to one another—what better way to identify human remains or a missing person than by locating the relatives of the person in question? Additional alleles also might be useful for "identification research." More generally, any additional allele the State looked at might help "to analyze and type . . . genetic markers contained in or derived from the

---

[15] The regulations adopted by the State Police do not provide further guidance to limit the use of the samples. *See* Md. Code Regs. 29.05.01.06(C) (listing same five purposes for samples as the statute).

DNA samples." "Genetic marker" is a "very broad[]" term used "to describe any observable variation that results from an alteration, or mutation, at a single genetic locus." National Center for Biotechnology Information, *Genome Mapping: A Guide to the Genetic Highway We Call the Human Genome* (2004), http://www.ncbi.nlm.nih.gov/About/primer/mapping.html (last visited Jan. 30, 2013). Such markers are used as landmarks by genetic researchers trying to orient themselves within a genome, and "[m]arkers can be within genes that code for a noticeable physical characteristic such as eye color, or a not so noticeable trait such as a disease." *Id.*

Nothing in the Act prevents the State from testing arrestee DNA samples for alleles that code into private physical traits or from maintaining a searchable database of those traits. It appears permissible under the law, for instance, for the State to collect information on whether arrestees have genes associated with such mental and physical diseases. Or, under the law, the State might choose to analyze arrestee samples for genes associated with violent responses to environmental stressors.[16] Such infor-

---

[16] *See, e.g.*, Rose McDermott *et al.*, *Monoamineoxadise A gene (MAOA) Predicts Behavioral Aggression Following Provocation*, 106 Proc. Nat'l Acad. Sci. 2118 (2009) (MAOA gene associated with aggression in high provocation situations); Giovanni Frazetto *et al.*, *Early Trauma and Increased Risk for Physical Aggression During Adulthood: The Moderating Role of MAOA Genotype*, PloS One2(5): e486. Doi10.1371/journal.pone.0000486 (2007) (low MAOA gene activity a significant risk factor for adult aggression when combined with early life trauma, such as absence of one or both parents, violence in the family); Avshalom Caspi *et al.*, *Role of Genotype in the Cycle of Violence in Maltreated Children*, 297 Science 851 (2002) (MAOA gene moderates antisocial response to mistreatment; individuals with

mation, along with a great deal of other information about an individual's health, family relationships and behavioral predispositions, could be framed as "identifying" that individual. The Act no more bars the State from "identifying" an individual as a person with a particular disposition or a particular genetic disease than it bars the State from "identifying" an individual as someone whose genetic material was present at a particular crime scene.

Moreover, the Act's expungement provision, Md. Code Ann., Pub. Safety § 2-511, would not apply to at least some of the information that Maryland might extract from arrestee samples. The Act provides for the destruction of samples and "DNA records" (which it defines as "DNA information stored in CODIS or the statewide DNA data base system," *id.* at § 2-501) if an arrestee is not convicted, *id.* at § 2-511. But if police have already learned an individual's family, behavioral dispositional or health information from their analysis of his or her sample, deleting the sample and the information in the database would not erase that information now known by individual police officers or even notes and records they might have placed in criminal files related to that individual, as opposed to his or her expunged DNA database entry.

Every day scientists unlock more of the "vast genetic treasure map" contained in human DNA. Maryland has passed a law allowing it to take DNA samples from arrested persons who have not been convicted of any crime. Despite its claims to the contrary, it has not limited itself to analyzing those

---

low MAOA activity genotype significantly more likely to develop antisocial behavior in response to maltreatment).

samples to generate a CODIS profile. Instead, it has created purported limitations that leave it free to mine those DNA samples for private medical and other information going far beyond what can be found in a fingerprint.

II. Maryland's Taking And Analyzing DNA Samples Clearly Constitutes A Search, While Fingerprinting May Not Be A Search.

Reaching into the interior of an arrestee's body to remove tissue and then analyzing that tissue for DNA clearly constitutes a search under the Fourth Amendment. *See Skinner*, 489 U.S. at 616-17; *Ferguson* v. *City of Charleston*, 532 U.S. 67, 76-77 (2001). Maryland and the United States each concede as much. Petitioner's Br. 13; U.S. Br. 14.

As Respondent aptly notes, there is reason to believe that fingerprinting, with its absence of physical intrusion, the limited information it obtains, and its longstanding use at booking and in many civil settings,[17] does not actually constitute a search. Respondent's Br. 35-36. Indeed that has been the

---

[17] *See* Part III(A), *infra*. Indeed, "we have come to accept that people—even totally innocent people—have no legitimate expectation of privacy in their fingerprints." *United States* v. *Kincade*, 379 F.3d 813, 874 (9th Cir. 2004) (Kozinski, J., dissenting); *cf. Dickerson* v. *United States*, 530 U.S. 428, 443 (2000) ("*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."). Fingerprinting is by now an accepted feature of applying for many jobs and licenses; so much so that the FBI currently has a civil file containing fingerprints from 36 million people. *See* Federal Bureau of Investigation, *IAFIS Fact Sheet*, http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis_facts (last visited Jan. 30, 2013).

position of the United States in at least one prior case, *Tolentino* v. *New York*, 131 S.Ct. 1387 (2011). Respondent's Br. 36.

That distinction is no mere formality. A search must be justified under the Fourth Amendment; an event that is not a search (or a seizure) need not be. This is true no matter how seemingly nonprivate the information sought when the government intrudes on a constitutionally protected area may seem. For example, in *United States* v. *Jones*, 132 S.Ct. 945 (2012), this Court considered the unwarranted placement of a GPS tracking device that collected information about a vehicle's location on public roads, where it was visible to all. *See id.* at 950. This Court declined even to consider the public nature of the information collected, instead focusing solely on the fact of the search: an event in which "the Government obtains information by physically intruding on a constitutionally protected area." *Id.* at 950-51 & n.3. Of the "argument that what would otherwise be an unconstitutional search is not such where it produces only public information," this Court simply concluded "we know of no case that would support" such an argument. *Id.* at 952. Similarly, in *Arizona* v. *Hicks*, 480 U.S. 321 (1987), this Court held that an officer picking up a turntable to inspect the serial numbers on the bottom during an otherwise plain view search constituted a further, impermissible search. *Id.* at 325. As this Court put it, "[a] search is a search, even if it happens to disclose nothing but the bottom of a turntable." *Id.* Private areas containing private

information and things are protected, no matter how narrowly the State attempts to frame its searches.[18]

Accordingly, Maryland's claim, that the collection of DNA samples under the Act is "of a kind" with fingerprinting because "a person who is arrested for a violent crime has no right to withhold his identity from the police," and "the Act limits the search at issue to identifying information only," is plainly incorrect. Petitioner's Br. 19. As discussed *supra*, nothing in the Act limits Maryland to analyzing the sample for the CODIS profile alone. But even if Maryland had actually limited itself to using arrestee samples to generate CODIS profiles, the seizure and analysis of the sample would be a search requiring justification. As the Maryland Court of Appeals observed, "upholding the statute simply because of restrictions on use of the material obtained would be analogous to allowing the government to seize private

---

[18] Nor is the collection of DNA samples rendered negligible by the fact that States have, at one time or another, unconstitutionally attempted such extreme bodily violations as forced insertion of a stomach tube to deliver emetics, forced manipulation of the prostate to cause ejaculation, or forced open chest surgery. NDAA Br. 6. That swabbing is not as transgressive as other possible intrusions does not blunt the fact that it is an infringement of bodily integrity. A search is a search. Just last term, this Court confirmed that the placement of a device on the underside of a car potentially as small as a credit card, with a weight of two ounces, was nonetheless a "physical occup[ation of] private property for the purpose of obtaining information." *See Jones*, 132 S.Ct. at 949; *see also id.* at 957 & n.1 (Alito, J., concurring). So too here, where the government seeks to physically occupy an internal body cavity for the purpose of obtaining information. *See Schmerber* v. *California*, 384 U.S. 757, 770 (1966) ("Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned.").

medical records without a warrant, but restrict their use only to the portion of the records that serve to identify the patient." *King* v. *State*, 42 A.3d 549, 576 (Md. 2012). *Hiibel* v. *Sixth Judicial Dist. Court*, 542 U.S. 177 (2004), says no differently. In *Hiibel*, petitioner was prosecuted and convicted for refusing to identify himself during a Terry stop—a seizure, but not a search. The statute at issue in *Hiibel* did not actually require an individual to provide anything more than his or her spoken name. *See id.* at 185. The question of whether the government may intrude into a suspect's body to take or confirm identity information was not raised. But that question has been amply answered by cases such as *Hicks* and *Jones*: a person surely has no less a privacy interest in his own DNA profile than he does in the serial numbers of his stereo equipment, or the public movements of his vehicle.

Nor do the significant restraints on liberty and privacy imposed on arrestees who are detained strip DNA collection of its status as a search and render it akin to fingerprinting. When detained in certain facilities, an arrestee's clothing and person may be searched, including by having "to move or spread the buttocks or genital areas, or to cough in a squatting position." *Florence* v. *Board of Chosen Freeholders*, 132 S.Ct. 1510, 1515 (2012). As a preliminary matter, unlike with swabbing, "[t]here [we]re no allegations that the detainees [in that case] were touched in any way as part of the searches." *Id.* at 1515; *see also id.* at 1523 (noting that there are "legitimate concerns about the invasiveness of searches that involve the touching of detainees"). More to the point, the significant intrusion into one aspect of some arrestees' privacy, justified by administrative needs like avoiding the introduction of weapons and other contraband

into confinement facilities, does not render permissible all searches of arrestees and their effects. Absent a warrant, arrestees' homes may be searched only to effectuate immediate concerns for officer safety, *Maryland* v. *Buie*, 494 U.S. 325, 336-37 (1990); their cars may not be searched unless they are within reaching distance of the passenger compartment at the time of the search, in order to preserve evidence and officer safety, *Arizona* v. *Gant*, 556 U.S. 332, 338, 351 (2009); and law enforcement may not willy-nilly search through their bank accounts, email, mail, phone records, or their medical or psychological records. This is true notwithstanding that any such searches might yield important information for correctly identifying the persons who have been arrested and linking them to their past conduct.

Unlike fingerprints, Maryland's DNA collection from arrestees is undoubtedly a search under the Fourth Amendment. As such it is subject to the same requirement of justification under the Fourth Amendment as other searches of the home or the body. This is true regardless whether the information sought in the search is itself inherently private, because of the private nature of those spaces and the right of individuals to enjoy them secure from government intervention.

III. The Purpose Of Fingerprinting Is To Identify. Maryland's Purpose In Seizing Arrestee DNA Is To Investigate Unsolved Crimes.

In addition to arguing (erroneously) that the seizure of DNA is no more intrusive than fingerprinting, Petitioner and *amici* employ the fingerprint-DNA analogy as a way of explaining the state's interest in DNA collection. The purpose of

DNA collection, they argue, is precisely the same as fingerprinting—to properly identify the person who has been arrested. Moreover, they continue, because DNA is a far more powerful tool for identification than fingerprints, it better serves the state's interest in accurate identification. *See* Petitioner's Br. 22.

But this argument is a smokescreen. Maryland's unmistakable purpose in collecting DNA is not to identify the arrestee, but to obtain evidence linking him or her to an unrelated offense—in other words, to *investigate* unsolved crimes. The primary function of fingerprinting, by contrast, is and has always been to *identify* individuals already in custody. The distinction matters because this Court has never sanctioned warrantless, suspicionless searches based solely on the government's general interest in investigating and solving crimes. *See* Respondent's Br. at 22-34 (explaining that DNA collection does not fit into any of the existing categories of exceptions to the Fourth Amendment's requirements of a warrant or individualized suspicion). Certainly, the routine practice of fingerprinting upon arrest has never been justified for that purpose. And, purpose aside, the fingerprint-DNA analogy fails for the simple reason that Maryland's statutory scheme, as well as the logistics of DNA analysis, make DNA testing a useful tool for investigating unsolved crimes but a poor one for identifying arrestees.

A. Unlike Fingerprinting, Whose Primary Purpose Has Always Been Identification, The Primary Purpose Of DNA Sampling Is To Investigate.

Courts have long justified fingerprinting as necessary for identification. Though the Supreme Court has never directly addressed the constitutionality of

fingerprinting arrestees, the practice has traditionally been justified by the government's legitimate need to identify individuals in custody.[19] Law enforcement officials began fingerprinting arrestees for identification purposes in the late nineteenth and early twentieth centuries, when growing urbanization led to greater anonymity, making it easier for an arrestee to hide his identity. *See* Simon A. Cole, *Suspect Identities: A History of Fingerprinting and Criminal Identification* 136-37 (2001). Fingerprinting emerged as a mechanism for (1) verifying that that arrestees were who they said they were, and (2) accurately linking them with records of their prior convictions, *id.* at 157-59, and became the fixture of the criminal justice system it is today by efficiently serving both goals.

Then, as now, fingerprinting upon arrest was a "record-keeping technology, a way of linking bodies in custody to their criminal records." *Id.* at 168. Early courts affirming the legality of the practice did not consider anything beyond this narrow purpose. For example, in *United States* v. *Kelly*, 55 F.2d 67, 69 (2d Cir. 1932), the Second Circuit reasoned,

> Finger printing seems to be no more than an extension of methods of identification long used in dealing with persons under arrest . . . and [it]

---

[19] As a matter of historical fact, because "the great expansion in fingerprinting came before the modern era of Fourth Amendment jurisprudence ushered in by *Katz* v. *United States*, 389 U.S. 347 (1967), it proceeded unchecked by any judicial balancing against the personal right to privacy." *Kincade*, 379 F.3d at 874 (Kozinski, J., dissenting). The cases cited by Petitioner and *amici* as upholding the legality of fingerprinting illustrate this point, as almost all of them pre-date *Katz*. *See* Petitioner Br. 8; NDAA Br. 13; Global Alliance Br. 11-12.

> has become especially important in a time when increased population and vast aggregations of people in urban centers have rendered the notoriety of the individual in the community no longer a ready means of identification.

See also Smith v. *United States*, 324 F.2d 879, 882 (D.C. Cir. 1963) ("[I]t is elementary that a person in lawful custody may be required to submit to photographing and fingerprinting as part of routine identification processes.") (internal citations omitted); *McGovern* v. *Van Riper*, 54 A.2d 469, 470 (N.J. Ch. 1947) ("[T]he taking of fingerprints, photographs and other measurements where the purpose to be served is to identify the accused as the person charged with the offense for which he is indicted, or to facilitate his recapture should he become a fugitive from justice, is proper . . . .").

Fingerprinting *as a means of identification* thus has a long history as an accepted law enforcement practice—a point repeatedly pressed by Petitioner and *amici*,[20] and one that no one disputes. But that history does little to clarify the issue of DNA sampling on arrest because, as examination of the Maryland scheme makes clear, DNA is not used to identify in the sense that fingerprints are used to identify—to "reveal [an arrestee's] identity" and to "call up an arrestee's record and to determine whether he is wanted for a crime." U.S. Br. 16 (describing function of fingerprinting). Rather, the Maryland DNA statute was enacted explicitly to assist law enforcement in investigating unsolved crimes. The identification of arrestees is not even one of the Act's enumerated

---

[20] *See* Petitioner's Br. 8; U.S. Br. 33; NDAA Br. 13; Global Alliance Br. 11-13.

purposes.[21] Prominent, however, among the statute's purposes is the collection and testing of DNA samples "as part of an official investigation into a crime." Md. Code Ann., Pub. Safety § 2-505(a)(2).

The Maryland statute establishes procedures for analysis and use of DNA samples that further illustrate that DNA is not used for immediate identification of an individual who has been arrested. DNA samples taken from arrestees "may not be tested or placed in the statewide DNA data base system prior to the first scheduled arraignment date unless requested or consented to by the individual." Md. Code Ann., Pub. Safety § 2-504(d)(1). But if the samples are not tested until after an arrestee has been arraigned, taking the sample plainly cannot identify the person when he is initially arrested. And, strikingly, the regulations implementing the Act state that, when a person in Maryland is arrested, if the State checks the system and determines that a sample for that person from a previous conviction already exists in the Statewide DNA Database, *no new sample is taken*. Md. Code Regs. 29.05.01.04(B)(4) ("If the collecting agency determines that a convicted offender Statewide DNA Data Base sample already exists for an arrestee, the agency is not required to obtain a new sample."). If Maryland were truly using the sample as a means of ensuring that they had properly identified the person they had arrested, a new sample would be taken at

---

[21] The Act does authorize the use of DNA information for identification of human remains and missing individuals and for "research and administrative purposes." Md. Code Ann., Pub. Safety §§ 2-505(a)(3)-(5).

every arrest.[22] The regulations suggest that Maryland instead relies on fingerprints and other traditional means for identification and leaves the DNA for investigation. And indeed, other regulations implementing the DNA statute reference the use of *fingerprints* to identify the DNA sample with the person who provided it.[23]

The legislative history of the Maryland statute reinforces that its passage was intended to aid in solving crimes, rather than to improve upon traditional identification methods. The record includes supporting statements from numerous law enforce-

---

[22] Moreover, the fact that the Maryland statute allows for expungement of an arrestee's DNA record in the event that he is not convicted or his conviction is finally reversed or vacated, Md. Code Ann., Pub. Safety § 2-511, is yet another indication that the statute is not primarily concerned with identification. As Judge Rendell pointed out with regard to the federal statute, "[i]f the Government's real interest were in maintaining records of arrestees' identities, there would be no need to expunge those records upon an acquittal or failure to file charges against the arrestee." *United States* v. *Mitchell*, 652 F.3d 387, 423 (3d. 2011) (Rendell, J., dissenting).

[23] *See* Md. Code Regs. 29.05.01.04(L) ("If the DNA arrestee sample is not collected at the time of electronic capture, such as LIVE SCAN or electronic booking facility or if an inked ten print card is used, then using normal fingerprinting procedures, the individual from whom a sample is taken shall place both inked index fingers where indicated on the DNA data base information card contained in the collection kit. These prints shall be used by the laboratory to check the individual's identity. If the subject is missing an index finger, this fact shall be indicated in the space for recording the fingerprint and the next available finger should be used with documentation as to which finger was used."); Md. Code Regs. 29.05.01.07(C) ("Verification of identity shall be conducted by the Latent Print Unit on the fingerprints found on the DNA data base information/chain of custody card.").

ment agencies. Every one of those statements hails the amendment as improving the state's investigative capacity, rather than its identification abilities.[24]

The State's Attorney for Montgomery County, for instance, explained that the amendment "giv[es] local law enforcement a critical tool to aid them in criminal investigations."[25] According to the President of the Fraternal Order of Police, the amendment "makes it easier for law enforcement officers to do their job. Quite often, we are hindered by not having access to good DNA evidence and therefore, making it difficult to solve a crime and put the bad guys in jail."[26] Even Governor Martin O'Malley, in his public statement urging the passage of the bill expanding DNA collection to arrestees, did not once mention traditional identification as a reason to support it. Rather, he stated that the bill should be supported in order to "to enhance our law enforcement efforts to resolve open cases."[27]

Maryland's push to collect arrestee DNA, and the reasons behind it, mirrors the federal expansion of CODIS. CODIS came into being as a national

---

[24] Relevant excerpts from the legislative history are contained in the Appendices.

[25] Letter from John J. McCarthy, State's Attorney, Montgomery County, and Ike Leggett, County Executive, Montgomery County, to Sen. Brian E. Frosh and Sen. Joseph F. Vallano, Chairmen, Senate Judicial Proceedings Committee (Mar. 7, 2008), at Appendix A.

[26] Letter from John "Rodney" Bartlett, Jr., President, Fraternal Order of Police, Maryland State Lodge, to Sen. Frosh (Feb. 27, 2008), at Appendix B.

[27] Statement of Governor Martin O'Malley on Senate Bill 211, Senate Judicial Proceedings Committee (Feb. 13, 2008), at Appendix C.

program because "the FBI saw the potential for exchanging and comparing DNA profiles to help solve crimes."[28] Congress authorized a nationwide DNA program in 1994, pursuant to which the FBI established CODIS, which allowed "State and local forensics laboratories to exchange and compare DNA profiles electronically in an attempt to link evidence from crime scenes for which there are no suspects to DNA samples of convicted offenders on file in the system." *See* DNA Analysis Backlog Elimination Act of 2000, H.R.Rep. No. 106-900(I) at 8.

In addition to the language and history of Maryland's statute, there is a practical reason why the "identification" justification for DNA collection fails: DNA testing does not work as a technique for the immediate identification of arrestees. The differences in the structures of the federal fingerprint database, the Integrated Automated Fingerprint Identification System ("IAFIS"), and CODIS illustrate this point. IAFIS contains an Identification Index (III), which "is the national system designed to provide automated criminal history record information," and "stores the criminal history record information of federal offenders and those offenders established by participating and non-participating III states."[29] An IAFIS "tenprint profile," which is the electronic or manual capture of the prints on all ten of the person's digits, associates a name with fingerprints and criminal history, and also includes

---

[28] Statement of Doug Hares, FBI Custodian of the National DNA Database, Nov. 23, 2011, http://www.fbi.gov/news/stories/2011/november/dna_112311 (last visited Jan. 30, 2013).

[29] Federal Bureau of Investigation, *Five Key Services*, http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis_services (last visited Jan. 30, 2013).

any "mug shots; scars and tattoo photos; physical characteristics like height, weight, and hair and eye color; and aliases."[30]

A CODIS profile, on the other hand, contains no names or other personal identifiers.[31] In order to learn any information about the source of the DNA profile, a CODIS user must take additional steps.[32] And quick identification using DNA is virtually impossible given the current state of the technology. Unlike an IAFIS request, which can take minutes or even seconds,[33] processing DNA takes, at a minimum, days, and more often, weeks or even months. *See* NDAA Br. at 19 ("It is true that . . . it takes several days or longer between the time the buccal swab first arrives at the DNA laboratory, and the time that a DNA profile, suitable for upload and comparison in a DNA database, has been developed.").[34] In the case at

---

[30] Federal Bureau of Investigation, *Integrated Automated Fingerprint Identification System*, http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis (last visited Jan. 30, 2013).

[31] *See* Federal Bureau of Investigation, *CODIS and NDIS Fact Sheet*, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet (last visited Jan. 30, 2013).

[32] "Personal information, such as the name and address of the individual from whom the DNA sample was taken, is retained by the uploading agency and may only be disclosed to particular persons for approved reasons." Natalie Ram, *Fortuity and Forensic Familial Identification*, 63 Stan. L. Rev. 751, 761 (2011).

[33] *See, e.g.*, Federal Bureau of Investigation, *IAFIS Fact Sheet*, http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis_facts (last visited Jan. 30, 2013) (noting that average IAFIS tenprint rapsheet request (TPRS) takes 23.9 seconds).

[34] The NDAA argues that DNA technology will soon improve to the point that identification will become a viable use for arrestee DNA samples, and that this Court should not strike down Maryland's DNA collection program now because the

bar, for instance, almost four months passed between the buccal swabbing of Mr. King and the "hit" generated by the database. Respondent's Br. at 9-10. This type of timeline is not atypical, given the caseload of most forensic laboratories, the time it takes to transform biological material into a workable DNA profile, and the time and personnel needed to complete a technical and administrative review of any results.[35] As the Maryland Court of Appeals observed in *King*, in rejecting the State's argument that DNA is used to identify:

> [T]he FBI's DNA database contains no personal identifying information, no names, no birth dates, no social security numbers, and no criminal histories. A 'hit' may take months to return. The DNA sample is not analyzed until after the first scheduled arraignment date. The profile must be uploaded and the database searched.

---

day will arrive when that program can be implemented for identification as well as investigation. *See* NDAA Br. at 19-21. This line of reasoning all but concedes that identification upon arrest is not the actual purpose of the Maryland statute. But more to the point, the approach urged by the NDAA would require the Court to base its decision on a hypothetical future in which new technologies have been developed, vetted and adopted. This Court has never dealt in hopes or possibilities that future events will bring a State into constitutional compliance.

[35] The Scientific Working Group for DNA Analysis Methods, which "serves as a forum to discuss, share, and evaluate forensic biology methods, protocols, training, and research to enhance forensic biology services as well as provide recommendations to the FBI Director on quality assurance standards for forensic DNA analysis," http://www.swgdam.org, provides a description of the required review process and personnel at http://www.swgdam.org/FBI%20Director%20Forensic%20Standards%20%20Revisions%20APPROVED%20and%20Final%20effective%209-01-2011.pdf (last visited Jan. 30, 2013).

> The laboratory must return the DNA profile. When a 'hit' arises, a law enforcement officer is notified, who must request the additional information.

42 A.3d at 579. Ultimately, DNA testing is so much less effective for identifying arrestees than is fingerprinting, and so much more effective for investigating unsolved crimes, that any claim that DNA is being collected for identification, rather than investigation, strains credulity. *See id.* at 579 ("Solving cold cases, in the State's view, is an ancillary benefit of determining the proper identification of an individual, but for King it was the only State interest served by the collection of his DNA."); *see also United States* v. *Mitchell*, 652 F.3d 387, 422-23 (3d Cir. 2011) (Rendell, J., dissenting) ("The real purpose of collecting arrestees' and pretrial detainees' DNA samples and including the resulting DNA profiles in the federal CODIS database is not to *'identify'* the arrestee . . . but to *use* those profiles and the information they provide as evidence in the prosecution and to solve additional past and future crimes.") (emphasis in original).[36] And indeed, to get around this problem,

---

[36] Though IAFIS is primarily used for identification—running standard "tenprint" searches to verify a person's identity and associated criminal history—IAFIS may also be used to match latent prints against the standard tenprint profiles. Federal Bureau of Investigation, *Seeing the Invisible*, http://www.fbi.gov/news/stories/2003/december/seeing123103 (last visited Jan. 30, 2013). However, latent fingerprint searches are conducted independently of searches of the normal tenprint index. Latent fingerprint searches can require special software, *see id.*, and the use of latent fingerprint specialists to find matches. Federal Bureau of Investigation, *Five Key Services*, http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis_services (last visited Jan. 30, 2013). Indeed, a latent database search will only return a list of potential candidates; a trained human

some have resorted to redefining the word "identification." *See, e.g.*, NDAA Br. 18-19 ("The concept of identification embraces more than just the name, date of birth, and social security or driver's license number. It also includes what the person has done."); *Mitchell*, 652 F.3d at 414 (identity is not just "who that person is (the person's name, date of birth, etc.)" but also "what that person has done," including "whether he is the same person who committed an as-yet unsolved crime across town" (quoting *Haskell* v. *Brown*, 677 F.Supp.2d 1187, 1199 (N.D. Cal. 2009)); *see also Haskell* v. *Harris*, 669 F.3d 1049, 1062 (9th Cir. 2012) ("'Identification' encompasses not merely a person's name, but also other crimes to which the individual is linked."). But this tactic merely stretches the notion of "identification" beyond all recognition, transforming it into the government's general interest in law enforcement by another name.

B. Taking Fingerprints For Investigation Triggers Fourth Amendment Concerns That Taking Them For Identification Does Not.

In blurring the categories of identification and investigation, Petitioner and *amici* intimate that the two can be treated the same under the Fourth Amendment. But, in addressing whether the exclusionary rule should apply to fingerprints that are

---

examiner must then evaluate the list to see if there is a match. *See* Simon A. Cole, *Don't Shoot the Messenger by One of the Messengers: A Response to Merlino et al.*, 45 Tulsa L. Rev. 111, 125 (2009). That the fingerprints catalogued in IAFIS, taken validly for the purposes of identification, can be used for the subsidiary purpose of investigation does not, however, answer the legal questions presented by DNA sampling done solely to investigate unsolved crimes.

taken pursuant to an unlawful detention, this Court as well as lower courts have drawn an analytical line between the purposes of identification and investigation in ways that are critical to the consideration of collecting arrestee DNA.

In *Davis* v. *Mississippi*, 394 U.S. 721 (1969), this Court held that fingerprints taken for after an arrest conducted without probable cause should be suppressed, because they were a fruit of the illegal seizure. In *Davis*, there was no question that the fingerprints were not used to confirm the petitioner's identity, but rather were taken solely for comparison with latent prints from the crime scene—for, in other words, investigation. *Id.* at 722-23. This Court held that "[d]etentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment" than other investigatory detentions. *Id.* at 727. This Court later reaffirmed "the holding in *Davis* that in the absence of probable cause or a warrant investigative detentions at the police station for fingerprinting purposes could not be squared with the Fourth Amendment." *Hayes* v. *Florida*, 470 U.S. 811, 815 (1985).

Lower courts have applied *Davis* and *Hayes* to hold that, where there is an unlawful detention, the question of whether fingerprints taken pursuant to that detention should be suppressed turns on the purpose for which the prints are taken: whether for identification, or to link the arrestee to a crime. In *United States* v. *Garcia-Beltran*, 389 F.3d 864 (9th Cir. 2004), for example, the defendant had been fingerprinted pursuant to an arrest conducted without probable cause. *Id.* at 865. The court held that the defendant's *identity* as determined by fingerprinting was admissible, because "fingerprints taken solely for

identification purposes (i.e., to verify that the person who is fingerprinted is really who he says he is) can be admitted, because evidence of 'identity' is never suppressible." *Id.* at 867 (citing *INS* v. *Lopez-Mendoza*, 468 U.S. 1032 (1984)) (emphasis in original). However, the court explained that "if . . . the fingerprints were taken for an 'investigatory' purpose, *i.e.* to connect Garcia-Beltran to alleged criminal activity, then the fingerprint exemplars should be suppressed." *Id.* at 865; *see also United States* v. *Oscar-Torres*, 507 F.3d 224, 232 (4th Cir. 2007) (fingerprint evidence admissible if taken for administrative rather than investigatory purpose; noting that "fingerprints taken as part of routine booking procedures but intended to provide evidence for a criminal prosecution are still *motivated* by an investigative, rather than an administrative purpose") (emphasis in original); *United States* v. *Olivares-Rangel*, 458 F.3d 1104, 1115 (10th Cir. 2006) ("[I]f an illegal arrest was purposefully exploited for the objective of obtaining fingerprints, then the fingerprint evidence must be suppressed"; remanding for evidentiary hearing to determine whether fingerprints were taken for identification or investigatory purpose); *United States* v. *Guevara-Martinez*, 262 F.3d 751, 756 (8th Cir. 2001) (fingerprints suppressed in part because they were not "obtained as a matter of course through routine booking procedures"); *cf. Friedman* v. *Boucher*, 580 F.3d 847, 860 (9th Cir. 2009) (holding that forceful extraction of DNA buccal sample from a pretrial detainee in the absence of a warrant or individualized suspicion, for the express purpose of solving unrelated cold cases, violated the Fourth Amendment).

There is thus a well-established distinction between identification and investigation even in the

fingerprint context; a distinction that Petitioner and *amici* elide in arguing that taking DNA samples from arrestees is no different than fingerprinting arrestees at booking.[37] Tellingly, however, throughout their repeated invocations of the fingerprint-DNA analogy, neither Petitioner nor *amici* have offered a single instance of arrestee DNA being used for traditional identification purposes—to verify that the person who has been arrested is who he says he is.

It is plain that the overriding, and indeed, most powerful, justification for collecting DNA upon arrest is the one offered by the text and history of the Maryland Act: it can help solve crimes. That is the import of the affecting stories told by *amici* of perpetrators caught, and victims given closure. But ultimately, as this Court has made clear, the state's ever-present interest in solving crimes is not enough on its own to justify a search into private realms. If it were, what prevents the state from invading the privacy of any person, with the assistance of any technology

---

[37] The United States, for example, attempts to surmount the reality that DNA is not used for identification by arguing that DNA helps to confirm the identity of an arrestee who has already been identified by other means, and noting that the Fourth Amendment does not impose a requirement that the state use the "least intrusive" search practicable. U.S. Br. 26. But the fact that DNA collection is no more than duplicative of other traditional methods of identification must certainly factor into any analysis that balances the government's need for an arrestee's DNA against the individual's privacy interest in his very cells. *Cf. Winston* v. *Lee*, 470 U.S. 753, 765-66 (1985) (holding that surgical removal of bullet evidence violated the Fourth Amendment, in part because the state had available to it "substantial evidence of the origin of the bullet" that limited the state's need to compel the surgery).

that makes that invasion more efficient than ever before?

CONCLUSION

For the reasons set forth above, *amicus* respectfully requests that the judgment of the Maryland Court of Appeals be affirmed.

Respectfully submitted,

SANDRA K. LEVICK
Counsel of Record
SONAM HENDERSON *
TARA MIKKILINENI
PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA
633 Indiana Avenue, N.W.
Washington, D.C. 20004
(202) 628-1200
SLevick@pdsdc.org

Counsel for Amicus Curiae

* Admitted only in NY; supervised by members of D.C. Bar

APPENDIX A

State's Attorney for Montgomery County
50 Maryland Avenue
Rockville, Maryland 20850

(240) -777-7300
Fax (240) 777-7413
www.communityprosecution.org

[Logo]
State's Attorney
John J. McCarthy

Deputy State's Attorneys
Laura Chase
John M. Maloney

March 7, 2008

The Honorable Brian E. Frosh
2 East Wing Miller Senate Office Building
Annapolis, MD 21401

The Honorable Joseph F. Vallario
101 Lowe House Office Building
Annapolis, MD 21401

Re: SB 211/HB 370 Public Safety — Statewide DNA Data Base System — Crimes of Violence, Burglary, and Breaking and Entering a Motor Vehicle Sample Collections on Arrest

Dear Chairman Frosh and Chairman Vallario:

We are writing to strongly urge passage of SB 211 and HB 370. These important pieces of life saving legislation will serve to expand Maryland's DNA database system giving local law enforcement a critical tool to aid them in criminal investigations. These bills require the collection of DNA samples from persons arrested for Crimes of Violence as

defined in Section 14-101(a) of the Maryland Criminal Law Article, as well as for burglaries and breaking and entering of motor vehicles. A total of 11 states, including Virginia, California, Texas and New Mexico have enacted similar legislation and an additional 26 others are considering it. SB 211/HB 370 will allow law enforcement to compare newly collected DNA to existing cases and older cold cases as well as those that occur in the future. The legislation will serve not only to protect the public against repeat violent offenders, but will also serve to exonerate individuals detained for offenses they did not commit.

With respect to issues of privacy and civil liberties, the procedure for collecting DNA under SB 211/HB 370 will be no more intrusive than the taking of fingerprints. Collection will be done by swabbing the inside of the person's mouth at the time of arrest. Moreover, the scope is limited to arrests for specific violent crimes specified by statute and the property crimes indicated above. Specified property crimes have been included, based upon research in Virginia indicating that roughly 40% of violent offenders had previous property crimes convictions. In addition, the DNA samples for these investigative purposes will not test for nor reveal genetic health information. Furthermore, in the event the arrestee is acquitted or if the charges are dropped, his DNA profile can be expunged from police records.

The Maryland Court of Appeals in *State v Raines*, 383 Md. 1 (2003), has previously addressed the issue of collecting DNA upon conviction. The Court found collection permissible, indicating that it is in the public's best interest for offenders likely to re-offend to have a lessened expectation of privacy. Moreover, in citing *Jones v. Murray*, a 1992 case from the

Fourth Federal Circuit, the *Raines* Court noted, when a suspect is arrested, "his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it. We accept this proposition because the identification of suspects is relevant not only to solving the crime for which the suspect is arrested, but also for maintaining a permanent record to solve other past and future crimes."

We believe that passage of these bills will enable law enforcement to solve crimes more quickly by using science to identify offenders earlier in the investigation, to prevent crime by linking repeat violent offenders to existing and older cases and keeping them behind bars, to free the innocent and to be used as an investigative tool that is blind to racial bias.

Thank you for your consideration of our position.

Sincerely,

/s/ Ike Leggett
Ike Leggett
County Executive
Montgomery County, Maryland

/s/ John J. McCarthy
John J. McCarthy
State's Attorney
Montgomery County, Maryland

cc: Governor Martin O'Malley
Senate Judicial Proceedings Committee
House Judiciary Committee

APPENDIX B

Maryland State Police
Fraternal Order of Police®
[Illegible] Road Baltimore, MD 21222

[Logo]
[Illegible]

[Md Flag Logo]
[Illegible]
[Illegible]

February 27, 2008

Senator Brian Frosh
Chairman. Judicial Proceedings Committee
Miller Senate Office Building, Ste 2E
Annapolis. Maryland 21401-1991

RE: SB0211 —"Public Safety - Statewide DNA Data Base System – Crimes of Violence. Burglary, and Breaking and Entering A Motor Vehicle – Sample Collections on Arrest

Dear Senator Frosh Members of the Committee:

The Maryland State Fraternal Order of Police hereby strongly supports HB211. This bill requires the collection of a DNA sample from an individual charged with crime of violence, burglary, B&E of a motor vehicle upon arrest at the facility where the arrest is processed. Sample of a DNA must also be expunged from statewide system if request is granted.

This bill certainly makes it easier for law enforcement officers to do their job. Quite often, we are hindered by not having access to good DNA evidence and therefore, making it difficult to solve a crime and

put the bad guys in jail. This bill effectively addresses that issue.

We urge a favorable report on this legislation. Thank you.

Respectfully,

/s/ John "Rodney" Bartlett. Jr.
John "Rodney" Bartlett. Jr.
President

APPENDIX C

STATE OF MARYLAND
OFFICE OF THE GOVERNOR

Martin O'Malley
Governor

State House
100 State Circle
Annapolis, Maryland 21401-1025
410-574-3901
Toll Free 1-800-811-8336

TTY Users Call Via MD Relay

Statement of Governor Martin O'Malley

SENATE BILL 211

Public Safety – Statewide DNA Data Base System – Crimes of Violence, Burglary, and Breaking and Entering a Motor Vehicle Sample Collections on Arrest

Senate Judicial Proceedings Committee
February 13, 2008

The foremost responsibility of government is to protect its citizens from violent crime and the predators who seek to destroy the safety and security of our communities. Swift apprehensions and the just convictions of violent felons increase public safety throughout our State. The expanded use of forensic DNA by state and local law enforcement officials across the Country has not only led to the apprehension and conviction of many violent offenders, it has exonerated the wrongly convicted.

In order to enhance our law enforcement efforts to resolve open cases, I ask for your support of Senate

Bill 211. This legislation, which was introduced last year by Senator Norman Stone, will require the collection of a DNA samples from offenders charged with a crime of violence or burglary at the time of their arrest. This evolution in Maryland's DNA law is necessary if we hope to significantly decrease violent crime.

Our legislation is modeled after Virginia's successful DNA program, enabling Maryland to join 11 other states who currently collect DNA from violent crime suspects at the time of arrest. It is important to note that Virginia's statute was recently upheld as constitutional by Virginia's Supreme Court in *Anderson v. Commonwealth of Virg*inia, 650 S.E. 2d 702 (2007). Their highest Court cited, adopted and expanded the Maryland Court of Appeals holding in *State v. Raines*, 383 Md. 1, 857 (2004), which stated, "The purpose of [the DNA profile] is akin to that of a fingerprint. As such, appellee and other incarcerated individuals have little, if any, expectation of privacy in their identity."

The Court went on to state that "(f)ingerprinting an arrested suspect has long been considered a part oldie routine booking process. Similarly, the taking of a DNA sample by minimally intrusive means is justified by the legitimate interest of the government in knowing for an absolute certainty the identity of the person arrested, in knowing whether he is wanted elsewhere, and in ensuring his identification in the event he flees prosecution" *Anderson*, 706. I am confident our statute is constitutional and when reviewed by our courts, it will survive scrutiny.

By expanding Maryland's DNA Database, law enforcement will be able to more efficiently resolve open criminal investigations, pursue repeat offenders, and

save valuable time pursuing false leads by effectively eliminating suspects from ongoing investigations. It is estimated that by adding the arrestees of violent crimes and burglaries to our current DNA database, we will add approximately 31,000 samples to our database per year. DNA is a powerful tool for state and local law enforcement; the anticipated $2.6 million per annum required to improve our efforts will pay significant dividends in saved lives.

Criminal history records reveal that repeat offenders typically have multiple violent felony arrests before a conviction is secured. Virginia has learned that approximately 40 percent of its solved violent crimes were perpetrated by those with previous property crime convictions.

In our State, the trends have been no different. For example, one need only look at the case of career criminal, John Doe who has been arrested 16 times since 1976. Under our proposed legislation, DNA could have been collected at the time of 10 of his arrests, some of which were sex offenses. Due to DNA, Baltimore County charged John Doe with a murder and a rape in 2000 and another rape in 2004 – all crimes dating from 1986. It seems that John Doe may have left his DNA at the scenes of these crimes allegedly committed 20 years ago.

Unfortunately, since those heinous crimes were committed, the following opportunities to end John Doe's violent crime spree were missed:

- John Doe was arrested for assault with intent to murder in 1986.
- John Doe was arrested for robbery.
- John Doe was arrested for rape and robbery.

- John Doe was arrested for a 1st degree sex offense.
- John Doe was arrested for robbery with a deadly weapon.

Under the proposed legislation, law enforcement would have been able to obtain a match using DNA samples collected from John Doe, thus avoiding these above mentioned missed opportunities. Were we able to take a DNA fingerprint at the time of these five arrests, John Doe would have been charged with murder and rape years earlier – avoiding at least one violent crime against a Maryland citizen.

We are making progress in the utilization of DNA technology. In the past year, Maryland's DNA backlog of 2,300 offender samples has been moved from dormancy on the shelves of our State's crime lab into action in the Federal Bureau of Investigation's Combined DNA Index System. Due to the cleared backlog, access to offenders' samples is available to federal, state, and local law enforcement officials. Through the creation of DNA Stat, our database is fully functioning as an effective crime prevention tool. Crucial positions in the crime lab that for years have been vacant and unfunded have been filled; $800,000 has been spent to fund long term equipment needs. A total of 4,682 new samples have been obtained from convicted offenders and 97% of the Division of Corrections inmates who owed samples were collected. As a result the number of positive DNA matches or hits increased by 51% in 2007 from 2006, with a total of 287 hits.

This increase in hits has assisted local and state police in apprehending many violent criminals. In Baltimore County, 24 rape cases were cleared

because of DNA leading to the arrest or charging of 15 suspects. In Montgomery County, the DNA profile of a convicted offender matched a profile of a 1995 rape, the identification of the perpetrator was verified and an arrest warrant has been issue. Howard County, Prince George's County and Baltimore City have also resolved open crimes as a result of the enhanced DNA Database. Simply put, the minimally intrusive step of swabbing DNA at the time of conviction saves lives; taking DNA at the time of arrest, will save even more lives.

In conclusion, I respectfully request your support of Senate Bill 211.

AMICUS CURIAE BRIEF

No. 12-207

In the Supreme Court of the United States

STATE OF MARYLAND, PETITIONER

v.

ALONZO JAY KING, JR.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR VETERANS FOR COMMON SENSE AS AMICUS CURIAE SUPPORTING RESPONDENT

ERIC D. MILLER
Counsel of Record
TODD M. HINNEN
NICOLA C. MENALDO
PERKINS COIE LLP
1201 Third Ave., Suite 4900
Seattle, WA 91119
(206) 359-8000
emiller@perkinscoie.com

TABLE OF CONTENTS

Page

Interest of amicus curiae 1
Summary of argument 2
Argument 4
A. Since 1992, the Armed Forces have collected DNA from service members for the purpose of identifying human remains 5
B. The current program of collection of DNA from military service members is consistent with the Fourth Amendment because of its limited purpose 10
C. A warrantless law-enforcement search of the military DNA repository would violate the Fourth Amendment 14
D. The collection and analysis of DNA implicates significant privacy interests 18
Conclusion 23

TABLE OF AUTHORITIES

Cases:

Arizona v. *Gant*, 556 U.S. 332 (2009) 12, 15, 19
Astrue v. *Capato*, 132 S. Ct. 2021 (2012) 21
Bruesewitz v. *Wyeth LLC*, 131 S. Ct. 1068 (2011) 2
City of Indianapolis v. *Edmond*, 531 U.S. 32 (2000) 13, 18
Davis v. *United States*, 512 U.S. 452 (1994) 11
Ferguson v. *City of Charleston*, 532 U.S. 67 (2001) 13
Griffin v. *Wisconsin*, 483 U.S. 868 (1987) 13, 18

Cases—Continued: Page

Henderson v. *Shinseki*, 131 S. Ct. 1197 (2011) 2
Katz v. *United States*, 389 U.S. 347 (1967).....15
Kyllo v. *United States*, 533 U.S. 27 (2001) 4, 22
Mayfield v. *Dalton*, 901 F. Supp. 300 (D. Haw. 1995), vacated, 109 F.3d 1423 (9th Cir. 1997) 6, 7
National Archives & Records Admin. v. *Favish*, 541 U.S. 157 (2004) 13
New Jersey v. *T.L.O.*, 469 U.S. 325 (1985).....13, 18
Parker v. *Levy*, 417 U.S. 733 (1974) 11
Rostker v. *Goldberg*, 453 U.S. 57 (1981).....11
Schmerber v. *California*, 384 U.S. 757 (1966).....19, 22
Skinner v. *Railway Labor Execs. Ass'n*, 489 U.S. 602 (1989) 3, 11, 12, 14, 15, 17
United States v. *Bickel*, 30 M.J. 277 (C.M.A. 1990).....12
United States v. *Ezell*, 6 M.J. 307 (C.M.A. 1979).....11
United States v. *Middleton*, 10 M.J. 123 (C.M.A. 1981) 11, 12, 18
United States v. *Stevenson*, 66 M.J. 15 (C.A.A.F.), cert. denied, 555 U.S. 816 (2008) 11, 16
Weiss v. *United States*, 510 U.S. 163 (1994).....11

Constitution, statutes, and rule:

U.S. Const. amend. IV .....*passim*
Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 1063(a), 116 Stat. 2653 (10 U.S.C. 1565a) 8
Privacy Act, 5 U.S.C. 552a 7
10 U.S.C. 1565a 3, 8, 13
10 U.S.C. 1565a(a).....16

Statutes and rule—Continued: Page

36 U.S.C. 902(a) 5
Mil. R. Evid. 313(b) 12

Miscellaneous:

Armed Forces Medical Examiner System, *Armed Forces Repository of Specimen Samples for the Identification of Remains* <tinyurl.com/afrssir> (last visited Feb. 1, 2013) 9
Armed Forces Repository of Specimen Samples for the Identification of Remains, *Collection Instructions* <tinyurl.com/dnacollection> (last visited Feb. 1, 2013) 8, 9
60 Fed. Reg. 31,287 (June 14, 1995) 7, 13
62 Fed. Reg. 51,835 (Oct. 3, 1997) 7, 9, 16
Patricia A. Foley, et al., *The Use of Reference DNA Samples to Establish DNA Identification, Confirmation and Re-Association of Combat Casualties During Operation Iraqi Freedom and Beyond* (2004) <tinyurl.com/iraqdna> 10
H.R. Rep. No. 450, 107th Cong., 2d Sess. (2002) 16
Susan W. Jones, et al., *The Role of DNA Identification in Military Incidents in the War on Terrorism in Afghanistan* (2002) <tinyurl.com/afghanistandna> 10
Donna Miles, *DNA Registry Unlocks Key to Fallen Servicemembers' Identities*, American Forces Press Service (Jan. 24, 2007) <tinyurl.com/dnaregistry> 9, 10

Miscellaneous—Continued: Page

Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 Mich. L. Rev. 291 (2010) 21

Michael Sledge, *Soldier Dead: How We Recover, Identify, Bury, and Honor Our Military Fallen* (2005) 5, 6

Kristina Wong, *No Rest While They're Missing: Armed Forces Lab Follows Leads, Finds Remains, IDs the Fallen*, Wash. Times, May 24, 2012, at A1 9

In the Supreme Court of the United States

No. 12-207

STATE OF MARYLAND, PETITIONER

v.

ALONZO JAY KING, JR.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR VETERANS FOR COMMON SENSE AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF AMICUS CURIAE*

The Department of Defense (DoD) collects DNA samples from all military personnel in order to identify the remains of deceased service members. It now holds DNA samples from more than six million current and former service members. This case concerns the

* No counsel for a party authored this brief in whole or in part, and no person other than amicus, its members, or its counsel has made a monetary contribution intended to fund the preparation or submission of the brief. The parties have entered blanket consents to the filing of amicus briefs, and copies of their letters of consent are on file with the Clerk.

application of the Fourth Amendment to a program of warrantless collection and analysis of DNA for the purpose of investigating criminal offenses as to which there is no individualized suspicion. The resolution of the question presented is of great importance to veterans because of their interest in the privacy of the genetic material contained in DoD's DNA repository.

Veterans for Common Sense is a non-profit organization formed in 2002 to raise the unique and powerful voices of veterans so that the nation's military, veterans, freedom, and national security are protected and enhanced for this generation and future generations. Veterans for Common Sense has filed amicus briefs in other cases of importance to the interests of veterans. See *Henderson* v. *Shinseki*, 131 S. Ct. 1197 (2011); *Bruesewitz* v. *Wyeth LLC*, 131 S. Ct. 1068 (2011).

SUMMARY OF ARGUMENT

Since 1992, DoD has collected blood samples from every member of the Armed Forces. The samples, now numbering more than six million, are stored untouched in a freezer at Dover Air Force Base. They are ready to be analyzed, should the need arise, to permit DNA identification of the remains of a fallen service member.

Although both the taking of blood samples and the analysis of the DNA that they contain constitute intrusions on the privacy interests protected by the Fourth Amendment, they can be justified when used for the identification of remains. In the military context, courts have recognized that the Fourth Amendment allows certain intrusions on privacy that are justified on the basis of military necessity, just as, in the civilian context, the Fourth Amendment permits cer-

tain warrantless searches conducted as part of a program that is justified on the basis of special needs unrelated to law enforcement. Accurately identifying the remains of those who have fallen in the service of our Nation is a military necessity that bears no relationship to ordinary law-enforcement interests. It is a compelling interest that justifies DoD's program.

This case involves the constitutionality of the warrantless collection and analysis of DNA from a person who has been arrested for a criminal offense. That practice cannot be justified on the same basis as the military's program. Petitioner's efforts to defend it rest on the premise that a DNA search is permitted under the Fourth Amendment as long as the government's interests outweigh the interests in individual privacy. But that proposition is at odds with the general rule that a search is not permitted "unless it is accomplished pursuant to a judicial warrant issued upon probable cause." *Skinner* v. *Railway Labor Execs. Ass'n*, 489 U.S. 602, 619 (1989).

On petitioner's theory, no warrant would be required to search the military's repository as part of a criminal investigation into a current or former service member. Indeed, since petitioner argues that probable cause is unnecessary, its theory would appear to permit a blanket policy of analyzing the entirety of the military's DNA repository and checking the results against the FBI's database of crime-scene DNA. Fortunately, Congress has taken a different view of the reasonableness of such a policy. In 10 U.S.C. 1565a, it made judicial authorization a prerequisite to any law-enforcement examination of DoD's repository. This Court's precedents demonstrate that Congress was

correct in understanding the Fourth Amendment to require prior judicial authorization, and petitioner's argument to the contrary is wrong.

Petitioner's theory also fails to take account of the substantial privacy interests implicated by the collection and analysis of DNA. According to petitioner, those interests are minimal because the analysis petitioner conducts entails looking at only a small part of an individual's DNA. But even that small part can reveal important private information. More fundamentally, petitioner's argument is flawed because it parallels the one rejected in *Kyllo* v. *United States*, 533 U.S. 27 (2001). In that case, the government attempted to defend the warrantless use of a thermal imager to examine a home on the ground that the device did not reveal "intimate details" of activities inside. *Id.* at 37. "In the home," the Court held, "*all* details are intimate details, because the entire area is held safe from prying government eyes." *Ibid.* The same is true of the information revealed by DNA.

ARGUMENT

The men and women who join the Armed Forces do so with the knowledge that they will be called upon to sacrifice many things—in some cases, even their lives. For more than 20 years, all members of the Armed Forces have given samples of their DNA to be stored in a DoD repository. They have done so to ensure that those who have fallen in the service of our Nation can be identified and accorded the respect that is their due. They have not done so to allow the government to investigate their DNA for other purposes, perhaps years after they have returned to civilian life.

Congress has recognized the profound interest of service members in the privacy of their DNA. The arguments advanced by petitioner, however, give short shrift to that interest and to the Fourth Amendment principles that protect it. Although this case concerns the collection of DNA from individuals arrested for criminal offenses, petitioner's arguments, if accepted, would also undermine the privacy of those who defend our Nation. Petitioner's arguments should be rejected.

A. Since 1992, The Armed Forces Have Collected DNA From Service Members For The Purpose Of Identifying Human Remains

1. It is a sad but essential duty of the Armed Forces to identify the remains of service members who are killed, whether accidentally or in combat. Accurate identification is necessary so that next of kin can be notified and the remains of their loved ones returned to them. More broadly, as Congress has recognized, obtaining a full accounting of service members who are missing in action is of vital importance to the military and to the Nation as a whole. See 36 U.S.C. 902(a) (designating the POW/MIA flag "as the symbol of our Nation's concern and commitment to resolving as fully as possible the fates of Americans still prisoner, missing, and unaccounted for in Southeast Asia, thus ending the uncertainty for their families and the Nation").

In the Civil War, when the military had not yet established an official mechanism for the identification of remains, many soldiers wrote their names on slips of paper pinned to their clothing. Michael Sledge, *Soldier Dead: How We Recover, Identify, Bury, and*

Honor Our Military Fallen 97 (2005). Since then, the military has recorded information about service members in order to facilitate post-mortem identification. By the time of the First World War, the military had begun to issue metal "dog tags" to be worn for identification. *Ibid.* But dog tags can be removed or destroyed, and the destructive power of modern weaponry has meant that even traditional forensic techniques such as fingerprinting and examination of dental records are not always adequate to identify remains.

Today, DNA analysis offers the potential for highly accurate and reliable identification. The military first used DNA analysis to identify the remains of fallen service members in the First Gulf War. *Mayfield* v. *Dalton*, 901 F. Supp. 300, 302 (D. Haw. 1995), vacated, 109 F.3d 1423 (9th Cir. 1997). To do so, it obtained DNA reference samples from relatives of fallen service members whose remains could not be identified through other techniques. Gov't Br. at 5, *Mayfield* v. *Dalton*, 109 F.3d 1423 (9th Cir. 1997) (No. 95-16626). That system had several flaws, however. Sometimes, biological relatives of the deceased could not be located. When they could be located, being asked to provide a sample caused them stress and uncertainty. And because family reference specimens are inferior to an original specimen from the individual in question, the identification process did not result in exact matches. *Ibid.*

2. Soon after the First Gulf War, DoD established a policy of collecting DNA samples from all active and reserve military personnel "upon their enlistment, reenlistment, or preparation for operational deploy-

ment." *Mayfield*, 901 F. Supp. at 302. The samples were initially maintained by the Department of the Army at the Armed Forces Institute of Pathology. 60 Fed. Reg. 31,287 (June 14, 1995). In a public notice under the Privacy Act, 5 U.S.C. 552a, the Army explained that its DNA repository contained specimens from military personnel, as well as "civilian personnel deploying with the armed forces" and family members of military personnel "who voluntarily provide specimens for DNA typing for [the] purpose of identifying the human remains of family members." 60 Fed. Reg. at 31,287. The only listed routine use of the specimens and accompanying records was disclosure "[t]o Federal, state, local and foreign authorities when the Armed Forces Institute of Pathology * * * is requested to identify human remains." *Id.* at 31,288.

In a later notice, DoD stated that specimens would be maintained for 50 years, but it provided a mechanism for individuals to request that their samples be destroyed "following the conclusion of the donor's complete military service or other applicable relationship to DoD." 62 Fed. Reg. 51,835, 51,836 (Oct. 3, 1997). It also set out a policy of allowing specimens to be disclosed in accordance with "a proper judicial order" if "needed for the investigation or prosecution of a crime punishable by one year or more of confinement," but only if "[n]o reasonable alternative means for obtaining a specimen for DNA profile analysis is available." *Ibid.*

In 2002, Congress codified that limited disclosure policy:

> (a) COMPLIANCE WITH COURT ORDER.—(1) Subject to paragraph (2), if a valid order of a Federal court

(or military judge) so requires, an element of the Department of Defense that maintains a repository of DNA samples for the purpose of identification of human remains shall make available, for the purpose specified in subsection (b), such DNA samples on such terms and conditions as such court (or military judge) directs.

(2) A DNA sample with respect to an individual shall be provided under paragraph (1) in a manner that does not compromise the ability of the Department of Defense to maintain a sample with respect to that individual for the purpose of identification of human remains.

(b) COVERED PURPOSE.—The purpose referred to in subsection (a) is the purpose of an investigation or prosecution of a felony, or any sexual offense, for which no other source of DNA information is reasonably available.

Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 1063(a), 116 Stat. 2653 (10 U.S.C. 1565a).

3. The military collects DNA samples by pricking a finger of the individual being sampled and smearing his or her blood to fill two circles on a paper card. Armed Forces Repository of Specimen Samples for the Identification of Remains, *Collection Instructions* <tinyurl.com/dnacollection> (last visited Feb. 1, 2013). Service members are provided with a Privacy Act statement that explains the purpose of the collection, the routine uses of the information collected, and the policy providing for the destruction of samples upon request after completion of military service. *Ibid.*

They are also informed that compliance with the collection procedure is mandatory, and that "possible consequences for failing to respond include adverse administrative actions and punitive disciplinary actions under the Uniform Code of Military Justice." *Ibid.*

The military maintains its DNA collection in the Armed Forces Repository of Specimen Samples for the Identification of Remains, which is located at Dover Air Force Base in Delaware. Armed Forces Medical Examiner System, *Armed Forces Repository of Specimen Samples for the Identification of Remains* <tinyurl.com/afrssir> (last visited Feb. 1, 2013). The repository now includes more than six million samples of the genetic material of current and former service members. Kristina Wong, *No Rest While They're Missing: Armed Forces Lab Follows Leads, Finds Remains, IDs the Fallen*, Wash. Times, May 24, 2012, at A1. The samples are stored in a freezer, and they are not analyzed until they are needed for the identification of remains. Donna Miles, *DNA Registry Unlocks Key to Fallen Servicemembers' Identities*, American Forces Press Service (Jan. 24, 2007) <tinyurl.com/dnaregistry> (Miles, *DNA Registry*); see 62 Fed. Reg. at 51,836 ("The data collected and stored will not be analyzed until needed for the identification of human remains.").

The repository has proven an indispensable aid in the identification of remains. Today, "[e]very time a U.S. servicemember is killed, pathologists at the Armed Forces Medical Examiner's Office * * * pull the servicemember's DNA sample to confirm—or reconfirm—the identity," and "[t]he results usually are

determined within 24 hours." Miles, *DNA Registry*. The repository has permitted the identification of remains of service members killed in Afghanistan by causes such as plane crashes and land-mine explosions that would have rendered the remains difficult or impossible to identify using conventional forensic means. Susan W. Jones, et al., *The Role of DNA Identification in Military Incidents in the War on Terrorism in Afghanistan* (2002) <tinyurl.com/afghanistandna>; see Patricia A. Foley, et al., *The Use of Reference DNA Samples to Establish DNA Identification, Confirmation and Re-Association of Combat Casualties During Operation Iraqi Freedom and Beyond* (2004) <tinyurl.com/iraqdna> (noting that the Armed Forces made "13 identifications based solely on DNA testing" in Iraq in 2003).

By contrast, uses of the repository for purposes other than the identification of remains have been exceedingly rare. In the first 10 years after DoD acknowledged that service members' DNA samples could be disclosed based on a court order, there were only two cases in which a court ordered the release of DNA from the repository for a criminal investigation. Miles, *DNA Registry*.

B. The Current Program Of Collection Of DNA from Military Service Members Is Consistent With The Fourth Amendment Because Of Its Limited Purpose

For purposes of the Fourth Amendment, the collection of DNA samples from military service members constitutes a search. See Pet. Br. 13; Gov't Br. 14; Resp. Br. 18-19. Moreover, if and when it occurs, "[t]he ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the

tested employee's privacy interests" and therefore is also a search. *Skinner* v. *Railway Labor Execs. Ass'n*, 489 U.S. 602, 616 (1989). Under the specific circumstances of the military's current program for identifying remains, however, those searches are constitutionally permissible.

1. Although "the military is, by necessity, a specialized society separate from civilian society," that does not mean that the provisions of the Bill of Rights are inapplicable in the military setting. *Parker* v. *Levy*, 417 U.S. 733, 743 (1974). To the contrary, the Bill of Rights applies to members of the Armed Forces except to the extent that any given protection has been made inapplicable either expressly or by necessary implication. See, *e.g.*, *Rostker* v. *Goldberg*, 453 U.S. 57, 67 (1981) (applying Due Process Clause); *Davis* v. *United States*, 512 U.S. 452, 457 n.* (1994) (assuming applicability of Self-Incrimination Clause); see also *Weiss* v. *United States*, 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring) ("[M]en and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service."). As relevant here, the military courts have repeatedly recognized that the Fourth Amendment protects service members. See, *e.g.*, *United States* v. *Stevenson*, 66 M.J. 15, 18 (C.A.A.F.), cert. denied, 555 U.S. 816 (2008); *United States* v. *Middleton*, 10 M.J. 123, 126-127 (C.M.A. 1981); *United States* v. *Ezell*, 6 M.J. 307, 314 (C.M.A. 1979).

To be sure, what the Fourth Amendment permits in the military setting is not always the same as what it permits in civilian life. Instead, the application of the Fourth Amendment may sometimes "take into account

the exigencies of military necessity and unique conditions that may exist within the military society." *Middleton*, 10 M.J. at 127. For example, service members may be subjected to an "inspection" by their commander—that is, an examination "conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of [a] unit, organization, installation, vessel, aircraft, or vehicle." Mil. R. Evid. 313(b). Such inspections are a "time-honored" military practice with roots in "the earliest days of the organized militia," and they have been upheld against Fourth Amendment challenges. *Middleton*, 10 M.J. at 127. They can even include an order to produce bodily fluids for drug testing. *United States* v. *Bickel*, 30 M.J. 277 (C.M.A. 1990). But "[a]n examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is *not* an inspection." Mil. R. Evid. 313(b) (emphasis added). While military necessity may justify a search conducted to maintain military fitness and discipline, it does not justify a search conducted for the purposes of law enforcement or criminal prosecution.

Principles of military necessity thus closely parallel the "special needs" doctrine developed by this Court in the civilian context. As a general matter, a search or seizure is not permissible "unless it is accomplished pursuant to a judicial warrant issued upon probable cause." *Skinner*, 489 U.S. at 619; *Arizona* v. *Gant*, 556 U.S. 332, 338 (2009). But the Court has recognized exceptions to that rule "when 'special needs, beyond the normal need for law enforcement, make the warrant

and probable-cause requirement impracticable.'" *Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987) (quoting *New Jersey* v. *T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in the judgment)). In those settings, the Court has "employed a balancing test that weighed the intrusion on the individual's interest in privacy against the 'special needs' that supported the program." *Ferguson* v. *City of Charleston*, 532 U.S. 67, 78 (2001). As with military necessity, however, the special-needs doctrine cannot justify a program of searches that is conducted for law-enforcement purposes. *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 45-46 (2000).

2. Unlike the FBI's Combined DNA Index System (CODIS), which was used in this case to match respondent's DNA to evidence of a crime, the military's DNA repository was created and is maintained for the sole purpose of "identify[ing] human remains." 60 Fed. Reg. at 31,288. As this Court has observed, the interest in honoring and respecting the dead has been recognized in almost all human societies. *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 167-168 (2004). That interest is especially great with regard to those who have fallen in the defense of our Nation. For that reason, the correct identification of the fallen may properly be described as both a military necessity and a "special need."

Significantly, the interest in the identification of fallen service members has nothing to do with ordinary law-enforcement interests, and the military DNA repository, as it is currently used, has minimal law-enforcement value. Under 10 U.S.C. 1565a, as under the DoD policy that predated it, DNA samples may be

disclosed for law-enforcement use only upon a court order. But in any case in which there is probable cause (a prerequisite to the issuance of an order for the disclosure of a specific individual's sample), there will also be sufficient cause to issue an warrant for the collection of DNA directly from the individual. It is therefore hardly surprising that disclosures based on a court order have occurred only a handful of times in the repository's history.

Because the military interest in identification of remains is unrelated to any law-enforcement interest, the Court may balance that interest against the privacy interests at issue in determining whether a search is permissible in the absence of a warrant or probable cause. *Skinner*, 489 U.S. at 602. Here, that balance tips in favor of the validity of the program. As discussed more fully below, the privacy interests at stake are substantial. But the interest in the correct identification of all fallen service members is compelling, and experience demonstrates that the use of DNA analysis is essential to achieving it. The military's carefully tailored program is constitutional.

C. A Warrantless Law-Enforcement Search Of The Military DNA Repository Would Violate The Fourth Amendment

Although service members understand that their DNA may be used to identify remains, they do not agree to let it be used for other purposes, and they retain a strong interest in its privacy. Petitioner's arguments, although nominally limited to the collection of DNA from arrestees, threaten to undermine the constitutional protections for the privacy of service members' DNA.

Petitioner argues that the warrantless collection of DNA from arrestees is permissible under the Fourth Amendment because it is reasonable. In petitioner's view (Pet. Br. 11-13; see U.S. Br. 11-14), the reasonableness of the collection should be determined by balancing the government's interests against the interest in individual privacy; here, petitioner says, that balance favors the government. That is incorrect. Although the Fourth Amendment prohibits "unreasonable" searches, it does not require that reasonableness be assessed on the totality of the circumstances in each case. To the contrary, this Court has held that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U.S. 347, 357 (1967) (footnote omitted); see *Gant*, 556 U.S. at 338; *Skinner*, 489 U.S. at 619.

The implications of petitioner's theory are sweeping. Petitioner emphasizes respondent's status as an arrestee, but in the circumstances of this case, there is little basis for distinguishing the privacy interests of arrestees from those of the general population. See p. 19, *infra*. Accordingly, if petitioner's theory were correct, there would be no need for judicial authorization before law enforcement could examine a DNA sample stored in the military repository. Instead, law-enforcement officers could access the repository upon their own determination that an individual's DNA sample might be useful in investigating or prosecuting a crime. Indeed, because individualized suspicion plays no role in petitioner's analysis, the logical impli-

cation of petitioner's position is that the government could take the entire military DNA repository, analyze all six million samples to develop a DNA profile for each, and then check the results against CODIS, just to see whether any current or former service member matches any crime-scene DNA. Fortunately, neither Congress nor this Court has accepted petitioner's view of the Fourth Amendment.

1. Congress has made clear that a prerequisite for the disclosure to law enforcement of DNA samples from the military repository is "a valid order of a Federal court (or military judge)." 10 U.S.C. 1565a(a). Even before Section 1565a was enacted, the Executive Branch had taken the same view: the statute "[c]odifies" the preexisting DoD policy permitting use of samples from the repository only upon a court order. H.R. Rep. No. 450, 107th Cong., 2d Sess. 7 (2002); see 62 Fed. Reg. at 51,836. The statute does not specify the standard for issuing such an order, and while it appears that no court has addressed the issue, the magnitude of the privacy interests at stake suggests that a finding of probable cause is required, as with an ordinary search warrant. In any event, whatever the precise standard it imposes, Section 1565a reflects the view that it is not a reasonable law-enforcement practice to collect and examine the DNA of a nonconsenting individual without specific judicial authorization. See *Stevenson*, 66 M.J. at 18 (rejecting the proposition that Congress or the Executive Branch "intended to abolish servicemembers' expectation of privacy in blood drawn in furtherance of military preparedness," and observing that Section 1565a "reflects considerable concern about the handling of DNA").

2. This Court's precedents also compel the conclusion, contrary to petitioner's theory, that law-enforcement searches of the military's DNA repository require judicial authorization based on probable cause. That is so for two reasons.

First, the DNA analysis of a sample in the repository is itself a search under the Fourth Amendment. As long as it remains in frozen storage, the sample is nothing more than two spots of blood on a paper card. Analyzing the blood to examine its DNA, however, can reveal highly personal information about the individual's familial relationships, medical conditions, and physical and behavioral characteristics. In the context of a test for drugs, this Court has recognized that "[t]he ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests." *Skinner*, 489 U.S. at 616. The same is true, *a fortiori*, when DNA is involved.

No exception to the warrant requirement permits such an intrusive search without the approval of a neutral magistrate. In particular, the military status of the individual who provided the sample does not provide a basis for an exception to the warrant requirement. For one thing, the individual may be a former service member who no longer has any connection to the military. More to the point, an analysis of the sample for ordinary law-enforcement purposes does not serve any military objective and thus has nothing to do with "the exigencies of military necessity and unique conditions that may exist within the military society" and that alone can justify a relaxed ap-

plication of the Fourth Amendment in the military context. *Middleton*, 10 M.J. at 127.

Second, as discussed above, the validity of the initial collection depends upon the purpose for which it is conducted, and, in particular, on the fact that the purpose does not involve "the normal need for law enforcement." *Griffin*, 483 U.S. at 873 (quoting *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in the judgment)). If law-enforcement searches of the military DNA repository were to become so commonplace as to become a significant part of the purpose of the collection program—as petitioner's theory apparently would permit—then the collection could no longer be justified on the basis of its non-law-enforcement purposes. See *Edmond*, 531 U.S. at 45-47 (explaining that an otherwise-permissible program of suspicionless searches or seizures becomes invalid when its "primary purpose" is law enforcement).

D. The Collection And Analysis Of DNA Implicates Significant Privacy Interests

Even if petitioner were correct that the Fourth Amendment calls for a balancing of interests in this case, rather than for application of the warrant requirement, its argument would still fail. While the government undoubtedly has a substantial interest in solving crimes, and while DNA analysis can be a powerful forensic tool, petitioner makes no effort to show that the collection of DNA without a warrant and without individualized suspicion is essential to furthering that interest. More importantly, on the other side of the balance, petitioner greatly understates both the intrusiveness of DNA collection and the privacy interests that are threatened by DNA analysis.

1. As an initial matter, petitioner relies (Pet. Br. 9; see U.S. Br. 9) on the proposition that an arrestee has a diminished expectation of privacy. But just as the Fourth Amendment protections available to a service member may be diminished by considerations of military necessity—but not by general law-enforcement considerations—so too is an arrestee's expectation of privacy diminished only with respect to intrusions on privacy that are related to the arrest. For example, while an arrestee may be subjected to a search incident to arrest, that search must be "commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy." *Gant*, 556 U.S. at 339. This Court has never held that, merely because an individual has been arrested for one offense, he may be searched in order to discover evidence of other, unrelated offenses. Thus, for the purposes of this case, the privacy interests implicated by the collection and analysis of respondent's DNA are the same as they would be for any other individual.

2. Under the DNA-collection procedures used by the military, which involve drawing blood, the impact of collection on Fourth Amendment interests is apparent. As this Court has held, an intrusion into the body to extract blood has sufficient magnitude that it ordinarily requires a warrant. *Schmerber* v. *California*, 384 U.S. 757, 770 (1966).

Even in the circumstances of this case, where the DNA collection was accomplished by a cheek swab rather than a blood draw, the intrusiveness of the collection procedure is significant—far more so than the taking of a fingerprint, to which petitioner attempts to

analogize it (Pet. Br. 19). Fingerprinting involves nothing more than contact with a part of the body that is ordinarily exposed to public view and is frequently touched by others. By contrast, the cheek swab involves an intrusion into the body, even if it is one that does not require breaking the skin. Petitioner argues (Pet. Br. 9) that the procedure entails only "a quick and painless rubbing of the cheek," but neither the speed of the procedure nor the degree of pain it entails is determinative in evaluating its offensiveness to the interests protected by the Fourth Amendment.

Similarly unpersuasive is the suggestion by the United States that the intrusion is "negligible" (U.S. Br. 9) because the area of the body involved is "readily accessible, visible to others when an individual speaks, yawns, or eats, and accustomed to touching with a toothbrush" (U.S. Br. 17). It is not true that the inside of one's cheek is commonly visible, in any meaningful sense, when one speaks, yawns, or eats. One might reasonably regard it as an invasion of privacy if others were to go out of their way to try to see—let alone touch—the inside of one's cheek. As for toothbrushing, there are several "readily accessible" areas of the body that one touches in the course of common hygienic activities, but it does not follow that a nonconsensual touching of those areas by another person would be a "negligible" intrusion on one's privacy.

3. Once a sample is taken, the analysis of the DNA it contains is also a significant intrusion on privacy. Petitioner attempts to minimize the privacy interests at stake by characterizing (Pet. Br. 15) the analysis of respondent's genetic material as "a search for his identity." The United States makes a similar argument

(U.S. Br. 19-22), again analogizing DNA analysis to the examination of fingerprints. The analogy is flawed. A fingerprint can be used only to determine identity, and it does not reveal anything about a person's family, medical condition, or personality. Not so with DNA, which is already capable of disclosing a wealth of such information, and whose revelatory power is almost certain to increase with future advances in medical understanding.

Petitioner emphasizes (Pet. Br. 15-16; see U.S. Br. 22-24) that the DNA profile used by CODIS includes data from only 13 loci and therefore does not reveal the breadth of private information that the genome as a whole contains. But even that limited data can reveal private information, including information about families. Familial parent-child relationships do not necessarily reflect biological parentage. See *Astrue* v. *Capato*, 132 S. Ct. 2021, 2030 (2012) ("[A] biological parent is not necessarily a child's parent under law."). And because it can be used to determine the existence or non-existence of biological relationships, the CODIS data can reveal "abandoned parental bonds, adoptee relationships, children conceived through technology, even family secrets about parental identity." Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 Mich. L. Rev. 291, 315 (2010). Those concerns are especially acute in the context of the military's DNA repository: the repository has now existed for long enough to contain samples from two generations of service members, and it also contains the complete DNA of all children born to two military parents. Thus, DNA analysis of the sort permitted by

petitioner's theory threatens the privacy not only of military personnel but also of their family members.

More importantly, petitioner is wrong to assume that, simply because the government currently chooses to analyze DNA samples in a way that reveals only limited information, this Court should ignore the potential of DNA to reveal much more. The United States advanced a similar argument in *Kyllo* v. *United States*, 533 U.S. 27 (2001), asserting that the warrantless use of a thermal imaging device to examine a home was constitutional because the device operated at a low resolution and therefore did not reveal "intimate details" of activities in the home. *Id.* at 37. This Court rejected that argument for two reasons, both of which apply here. First, the Court explained that accepting the government's position would require difficult and impractical line-drawing because the Court would have to assess the constitutional significance of every change in imaging technology. *Id.* at 38. Second, the Court concluded that the government's effort to distinguish intimate from non-intimate details was "wrong in principle." *Ibid.* "In the home," the Court reasoned, "*all* details are intimate details, because the entire area is held safe from prying government eyes." *Id.* at 37. And if that is true of the home, "no less could be required where intrusions into the human body are concerned." *Schmerber*, 384 U.S. at 770.

CONCLUSION

The judgment of the Maryland Court of Appeals should be affirmed.

Respectfully submitted.

ERIC D. MILLER
Counsel of Record
TODD M. HINNEN
NICOLA C. MENALDO
PERKINS COIE LLP
1201 Third Ave., Suite 4900
Seattle, WA 91119
(206) 359-8000
emiller@perkinscoie.com

FEBRUARY 2013